EDITOR'S NOTE

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• 85-792-CFX
atus: GRANTED

Title: Interstate Commerce Commission, Petitioner
v.
Brotherhood of Locomotive Engineers, et al.

cketed:
vember 7, 1985

Court: United States Court of Appeals for the District of Columbia Circuit

de:
85-793
e also:
85-1054
85-983

Counsel for petitioner: Rush, Henri F.

Counsel for respondent: O'Brien, Denise M., Levy, Gregg H., Manson III, Joseph L., Ross, Harold A., Clarke Jr., John O'B., Solicitor General

try	Date	Note	Proceedings and Orders
1	Nov 7 1985	G	Petition for writ of certiorari filed.
2	Nov 7 1985		Appendix of petitioner ICC filed.
3	Nov 25 1985		Brief of respondents Union Pacific RR Co., et al. in support of petition filed. VIDED.
4	Nov 25 1985		Waiver of right of respondent United States to respond filed.
5	Dec 6 1985		Brief amicus curiae of Assn. of American Railroads, et al. filed. VIDED.
6	Mar 5 1986		DISTRIBUTED. March 21, 1986
7	Mar 5 1986		REDISTRIBUTED. March 21, 1986
8	Mar 24 1986		Petition GRANTED. The case is consolidated with 85-793, and a total of one hour is allotted for oral argument.
			**********
9	Apr 10 1986	G	Motion of petitioners to dispense with printing the joint appendix filed.
10	Apr 21 1986		Motion of petitioners to dispense with printing the joint appendix GRANTED.
11	Apr 23 1986		Record filed.
12	Apr 23 1986		Certified copy of original record and C. A. proceedings received.
14	May 1 1986		Order extending time to file brief of petitioner on the merits until June 7, 1986.
15	Jun 6 1986		Brief amicus curiae of Assn. of American Railroads, et al. filed. VIDED.
16	Jun 6 1986		Brief of respondents Union Pacific RR Co., et al. in support of petition filed. VIDED.
17	Jun 6 1986		Brief of petitioner ICC filed. VIDED.
18	Jun 19 1986	G	Motion of the Solicitor General for divided argument filed.
19	Jun 23 1986	G	Motion of respondents Brotherhood of Locomotive Engineers, et al. for divided argument filed.
20	Jun 30 1986		Motion of the Solicitor General for divided argument GRANTED.
22	Jul 3 1986		Order extending time to file brief of respondent on the merits until August 8, 1986.
23	Aug 7 1986		Brief of respondent Bhd. of Locomotive Engr. filed. VIDED.
24	Aug 7 1986		Order further extending time to file brief of respondent on the merits until August 15, 1986.
25	Aug 7 1986		The above extension applies to all respondents.
26	Aug 15 1986		Brief of respondent United Transportation Union filed.

app

). 85-792-CFX

ıtry	Date	Note	Proceedings and Orders
			VIDED.
27	Aug 26 1986		CIRCULATED.
28	Sep 3 1986		motion of respondents Brotherhood of Locomotive engineers, et al. for divided argument GRANTED.
29	Sep 3 1986		SET FOR ARGUMENT. Monday, November 10, 1986. This case is consolidated with No. 85-793. (4th case) (1 hour)
30	Oct 27 1986	X	Reply brief of petitioner ICC filed. VIDED.
31	Nov 10 1986		ARGUED.

85-792

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND UNITED TRANSPORTATION UNION, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

78p

QUESTION PRESENTED

Whether the majority of the panel of the court below has improperly superimposed a findings requirement not contemplated by Congress upon the exemption from all other laws afforded by 49 U.S.C. § 11341(a) to consolidations approved by the Interstate Commerce Commission under 49 U.S.C. § 11344 by requiring the Commission to anticipate and enumerate at the time of its approval all legal obstacles being waived in order for the statutory exemption to be effective against a subsequent challenge.

PARTIES TO THE PROCEEDINGS

The following parties appeared in the proceedings before the Court of Appeals below:

Interstate Commerce Commission
United States of America
Denver & Rio Grande Western Railroad Company
Missouri-Kansas-Texas Railroad Company
Union Pacific Railroad Company
Missouri Pacific Railroad Company
Association of American Railroads and National Railway Labor Conference, as *Amici Curiae* in support of Petitions for Rehearing and Suggestions for Rehearing *En Banc*.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
UNITED TRANSPORTATION UNION, RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Interstate Commerce Commission petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A 1a-41a) is reported at 761 F.2d 714. The two Commission decisions (App. F 51a-54a and App. G 55a-68a) are unreported.

JURISDICTION

The decision of the court of appeals (App. A 1a-41a) was entered on May 3, 1985. The judgment of the court of appeals (App. B 42a-43a) was also entered on May 3, 1985. On July 12, 1985 and July 19, 1985, the panel of the court of appeals *sua sponte* amended the May 3 decision so as to remand the proceedings to the Commission (App. C 44a-45a), and amended the dissenting opinion of Judge MacKinnon (App. D 46a-47a). The timely joint petition of petitioner Interstate Commerce Com-

mission and United States and the separate petitions of the interested railroads for rehearing with suggestion for rehearing *en banc* were denied on August 9, 1985. (App. E 48a-50a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 11341, 11343, 11344 and 11347 and the Railway Labor Act, 45 U.S.C. 156 and 157 are set forth at App. H 69a-82a.

STATEMENT OF THE CASE

1. Under 49 U.S.C. 11343, the Interstate Commerce Commission has exclusive jurisdiction to approve railroad consolidations and trackage rights transactions; and under 49 U.S.C. 11344, the Commission has extraordinarily broad discretion to impose protective conditions for the benefit of other railroads to ameliorate anticompetitive impacts of the approved transaction. See *Seaboard Coast Line R.R.* v. *United States*, 599 F.2d 650, 652 (5th Cir. 1979); *Florida East Coast Ry* v. *United States*, 259 F. Supp. 993, 1001 (M.D. Fla. 1966), *aff'd*, 386 U.S. 544 (1967); and *Southern Pac. Transp. Co., et. al.* v. *I.C.C.*, 736 F.2d 708, 721 (D.C. Cir. 1984) *cert. denied*, 105 S. Ct. 1171 (1985). If the Commission approves a railroad consolidation and/or trackage rights application, 49 U.S.C. 11347 requires that the Commission impose certain provisions to protect the interests of employees adversely affected by the approved transaction. Finally, and, most importantly, once the agency grants its approval, 49 U.S.C. 11341(a) exempts a carrier, corporation, or person participating in the approved rail consolidation or trackage rights transaction from the antitrust laws and from all other laws, including State and municipal law, as necessary to let the participants carry out the approved transaction.

2. This petition for certiorari embraces an adverse opinion of a divided panel of the United States Court of

Appeals for the District of Columbia Circuit vacating two Interstate Commerce Commission decisions. The first Commission decision denied a petition by the Brotherhood of Locomotive Engineers (BLE) seeking clarification of a provision of a condition imposed to ameliorate certain anticompetitive aspects of the railroad consolidation approved some six months earlier in *Union Pacific—Control—Missouri Pacific, Western Pacific*, 366 I.C.C. 459 (1982), affirmed in relevant part, *Southern Pac. Transp. Co. et al.* v. *I.C.C.*, *supra*. The second decision denied a petition for reconsideration filed by BLE and the United Transportation Union (UTU) of the Commission's prior denial of BLE's Petition for Clarification. At issue is the Interstate Commerce Commission's interpretation of the governing exemption statute, 49 U.S.C. 11341, (adopted by at least two courts) as being self-executing so as to automatically exempt Commission approved rail consolidation and trackage rights transactions from the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA), without the need for express agency findings. In this case, the majority would have required of the Commission findings that permitting the bargaining provisions of the RLA to apply to a dispute which developed long after the Commission's approval of a combination of transactions would serve as an impediment to implementing those transactions and explaining why (App. C 45a).

3. The controversy stems from the Commission's approval of a major rail consolidation between the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) railroads. In September 1980, these three large carriers applied to the Commission for approval to consolidate their operations. A number of railroads, including the Missouri-Kansas-Texas Railroad Company (MKT) and the Denver & Rio Grande Western Railroad Company (DRGW), labor organizations and States opposed the applications and sought various protective conditions. MKT applied for protective trackage rights to operate over MP's line extending between Kansas City,

KS and Omaha, NE, and stated in its proposed trackage rights agreement that it would use its *own employees* to operate its trains over the line. DRGW sought protective trackage rights to operate over MP's line between Pueblo, CO, and Kansas City, MO; and its proposed agreement included an option to operate over the line with its *own crews*.

UTU and BLE filed comments in opposition to the MKT and DRGW trackage rights applications and requested specified labor protective conditions in the event the applications were approved, but submitted no opposition to the proposed crewing terms.

In October 1982, the Commission approved the proposed consolidation, subject to several conditions to ameliorate various anticompetitive effects of the consolidation, including granting the MKT and DRGW their protective trackage rights. See *Union Pacific—Control—Missouri Pacific*, 366 I.C.C. 459 (1982), (hereinafter "*UP-Control-MP*"), *affirmed in all material respects sub. nom. Southern Pacific Transportation Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984) (*per curiam*), *cert. denied*, —— U.S. ——, 105 S. Ct. 1172 (1985) (hereinafter "*SPT*").[1] Although numerous persons sought judicial review of the Commission's decision approving the consolidation, including various organizations representing rail labor, neither BLE nor

[1] The consolidation was made subject to the usual statutorily mandated labor protective conditions as set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*), *aff'd sub nom. New York Dock Railway* v. *I.C.C.*, 609 F.2d 83 (1979). The DRGW and MKT trackage rights were made subject to the statutorily mandated labor protective conditions as specified in *Norfolk & Western Ry. Co.—Trackage Right—BN*, 354 I.C.C. 605 (1978) (*N & W*), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 664 (1980). 366 I.C.C. at 654, affirmed *Railway Labor Executive's Ass'n* v. *ICC*, 675 F.2d 1248 (D.C. Cir. 1982) ("RLEA"). The history and development of labor protective conditions under the IC Act are discussed and explained at some length in *RLEA*. A more detailed account of the history can be found in *New York Dock Ry.* v. *I.C.C.*, *supra*, 609 F.2d at 86-90.

UTU sought judicial review of the crewing provision in these approved trackage rights arrangements during the statutorily prescribed period for seeking judicial review.

After DRGW and MKT began their respective trackage rights operations, MKT using its own crews and DRGW initially using MP crews, a dispute arose between the involved railroads and the UTU and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. On March 28, 1983, UTU officials threatened to strike MP if MP continued to permit crews of DRGW and MKT to operate over MP track before bargaining with its local over the terms and conditions of such use. On March 30, 1983, MP sought and received a temporary restraining order prohibiting the strike against MP in the United States District Court for the Eastern District of Missouri-Eastern Division. See *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984) (appeal pending 8th Cir. No. 84-1465) (*Missouri*).[2]

[2] On March 1, 1984, in the original District Court suit in *Missouri*, *supra*, 580 F. Supp. 1490, the court issued a preliminary injunction against the union's threatened strike. In reaching its decision, the District Court found, among other things, that MP was exempted under section 11341(a) from any requirements of the RLA to negotiate concerning the crew selection clause in the approved trackage rights agreements. In granting the injunction, the District Court relied on the Commission's October 1983 order's statement that the "[p]rovisions of trackage rights agreements designating which carrier's employees will perform the trackage rights operations are material terms of the agreement and may be implemented without further approval." In this regard, the Court emphasized that MP was exempted from any RLA duty to negotiate over the selection of crews and that the Norris-LaGuardia Act restraints on a court's ability to enjoin labor strikes must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA. *Id.* at 1503. The Court emphasized further that the Commission has the right to impose conditions, in approving consolidations, that conflict with existing collective bargaining agreements and RLA procedures, noting that:

[Continued]

At about the same time, on April 4, 1983, BLE filed a petition with the Commission seeking clarification as to whether *UP—Control—MP* permitted MKT and DRGW to utilize their own crews. For the first time, the unions also questioned the Commission's power to authorize trackage rights applications that allow competitor railroads to use their own crews to operate their own trains. On May 12, 1983, the Commission denied the petition on the ground that clarification was not required and no basis had been shown for reopening *UP—Control—MP*. (App. F 54a).

BLE joined by UTU then sought reconsideration of the Commission's May 12 decision contending that (1) crew assignment disputes must be settled under the RLA; (2) the Interstate Commerce Act requirement for labor protective provisions, 49 U.S.C. 11347, prohibited MKT and DRGW from unilaterally deciding to use their own crews; and (3) even if the Commission could override the RLA and the Interstate Commerce Act labor protective provisions through its powers to exempt transactions from otherwise applicable law, the Commission failed to make the necessary findings to support the exemption.

On October 19, 1983, the Commission denied the unions' request for reconsideration. The agency specifically

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[2] [Continued]

allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

The District Court, as had the Commission, relied upon *Brotherhood of Loc. Eng.* v. *Chicago and Northwestern Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963) (*C&NW*) for its conclusion that Section 11341(a) is self-executing.

The United States Court of Appeals for the Eighth Circuit is now reviewing the District Court decision in Docket No. 84-1465, *Missouri Pacific Railroad et al.* v. *UTU*. The Commission has intervened and has requested the 8th Circuit to affirm the District Court's application of its *C&NW* decision.

found that the trackage rights agreements in issue do not change MP employees' working conditions or violate any collective bargaining agreements. The Commission emphasized that, even if the approved transaction changed the working conditions of MP employees, once the agency, pursuant to its exclusive jurisdiction under 49 U.S.C. 11344, approves the trackage rights transaction, 49 U.S.C. 11341 by its terms exempts the approved transaction from the requirements of all laws, including the RLA, as necessary to permit implementation of the transaction. The Commission relied upon *Brotherhood of Loc. Eng.* v. *Chicago and Northwestern Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963 (*C&NW*) in support of the position that no findings by it were required to bring into play the statutory exemption.

The agency also observed that nothing in the record suggested that approval of the trackage rights applications, subject to the usual labor protection conditions mandated by 49 U.S.C. 11347, would be inconsistent with the RLA. Finally, the Commission emphasized the importance and necessity of the crewing terms of the trackage rights, explaining (1) that it approved the MKT and DRGW trackage rights to ameliorate certain anticompetitive impacts of the UP-WP-MP consolidation; and (2) that MKT and DRGW would handle traffic for their own account in competition with UP-MP. The Commission thus found the crewing provisions of the trackage rights agreements to be material terms of the agreement that may be implemented without further agency approval. (See App. G 58a-68a).

4. A divided panel of the court of appeals (App. A 1a-41a) vacated, without remanding,[3] the Commission's May and October 1983 decisions and left the parties to

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[3] On July 12, 1985, the panel *sua sponte* amended its opinion so as to remand the proceeding to the Commission. The decision otherwise remained the same. (App. C 44a-45a).

whatever remedies they may have under the dispute resolution mechanisms contained in the RLA.

The court first addressed whether the unions had timely sought judicial review and found that the unions were not barred from seeking judicial review, even though their appeal was not filed within the 60 days requirements of the Hobbs Act, 28 U.S.C. 2344. The majority reasoned that the unions were justified in believing up until the Commission's denial of their petitions for clarification that the approved trackage rights agreements' crewing provisions were qualified by imposition of the *N&W* labor protective conditions. (App. A 11a-14a).[4]

Judge MacKinnon dissented. (App. A 22a-41a). He noted the majority's failure to point out any conflict between the approved trackage rights agreements and the

[4] The court of appeals acknowledged its recent ruling in *National Bank of Davis* v. *Office of the Comptroller*, 725 F.2d 1390 (D.C. Cir. 1984) (per curiam), that a party could not circumvent the time limit by first requesting the agency to reopen its decision after the period for judicial review has passed, and then raising judicial challenges to the original decision through a petition to review the agency's procedural refusal to reopen the case. However, the court held that the Commission, in stating that the *N&W* conditions would be applied to the trackage rights, created a reasonable expectation that the unions would have an opportunity to bargain over crew selection issues, notwithstanding the contrary terms of the MKT and DRG applications; and the unions, thus "had no notice of their present claim until after ICC denied their petition for clarification and reconsideration thereof." (App. A 12a).

The Commission believes the *N&W* conditions are definite in their terms and well known by the unions as not including the right of applicants' employees to bargain or require their employer to bargain on their behalf with third parties to a transaction approved by the Commission on the manner in which rights granted those third parties as a condition of approval of that transaction shall be implemented. However, because no party has ever previously raised the issue before the Commission it has never been definitively resolved and arguably the equitable exception relied on by the majority of the panel was available to petitioners as the majority concluded.

[Continued]

Commission imposed labor protective conditions, collective bargaining agreements, or rights protected by the RLA (App. A 28a-30a).

The majority of the panel of the court of appeals then reached the merits and found that the RLA dispute resolution mechanisms may not be waived without an adequate finding of necessity for doing so. In this regard, the majority below found that the Commission never made such a finding (App. A 16a-20a). Although the majority acknowledged that the Commission need not enumerate every legal obstacle waived under Section 11341(a) (App. A 16a, n.4), they still held that the Commission should have, but did not, give adequate reasons for removing crew selection from the RLA collective bargaining process (App. A 18a-21a). In reaching its conclusion on the merits, the court of appeals rejected the Commission's principle authority, *C&NW* (*Id.* at n.6, emphasis in original):

> *C&NW* did say that no *statement* of necessity was required. *Id.* at 432. To the extent that C&NW may be read to say that ICC need supply no *basis* for the necessity determination, we find the Interpretation ill-conceived and reject it.

Judge MacKinnon also dissented from the merits portion of the majority's decision (App. A 28a-41a). He pointed out the inapplicability of the cases relied upon by the majority to support its requirement of express findings of necessity and the failure of the majority to come to grips with the holdings of the Eighth Circuit in *C&NW*, *supra*, this Court in *Schwabacher* v. *United States*, 334

[4] [Continued]

Although the Commission believes Judge MacKinnon's position is analytically more sound—absent reason to believe the right existed, petitioners should have been held to the 60 days time limit provided in the Hobbs Act (App. A 22a-28a)—we do not challenge this aspect of the court of appeals decision. In addition, there is an alternative view of the development of the instant case discussed *infra* at n.9, under which the timeliness holding of the majority is unquestionably correct.

U.S. 182 (1948), and the reasoning of the decision of the District Court in the *Missouri* case which respondents below had relied upon and urged the court below to adopt.[5] (App. A 31a-38a).

Although disagreeing with the majority view that specific findings of necessity must be expressly enunciated to effect a displacement of RLA procedures, Judge MacKinnon found ample explication by the Commission in light of the undisputed necessity for imposing the trackage rights conditions to offset competitive effects of the principal consolidation, the likelihood that that purpose would be frustrated by requiring the negotiations sought by rail labor, and the fact that the now asserted conflict with existing collective bargaining agreements was never raised before the Commission (App. A 38a-41a).

Subsequently, the Commission (joined by the United States) and the affected railroads petitioned for rehearing with suggestion for rehearing *en banc*. On July 12, 1985, the panel *sua sponte* amended its opinion so as to remand the proceeding to the Commission. Subsequently, the original court panel and the court *en banc*, respectively, denied the petitions for rehearing and suggestion for rehearing *en banc* (App. E 48a-50a).[6]

REASONS FOR GRANTING THE WRIT

The holding of the majority of the panel of the court below incorrectly determines an important question of federal law in a manner which conflicts with the decision of another United States Court of Appeals and of a United States District Court. It creates a chaotic situa-

[5] Because the Commission continues to believe the decision of the District Court in *Missouri* represents a cogent and correct application of appropriate legal principles to this case, a copy is appended as Addendum A for the convenience of the court.

[6] Senior Circuit Judge MacKinnon, who dissented in the initial adverse court of appeals decision, would have granted the petition for rehearing, and Circuit Judge Starr would have granted the suggestion for rehearing *en banc*.

tion in the area of labor relations in the railroad industry and severely and inappropriately burdens the Commission's exercise of its plenary authority to approve rail consolidations.

(1) Section 11341(a) of Title 49 U.S.C. provides in relevant part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in . . . a transaction approved by or exempted by the Commission under this subchapter . . . is exempt from the antitrust laws and from all other law . . . as necessary to let that person carry out the transaction.

Plainly, the exemption provided by that section is self-executing and is contingent only upon the Commission's approval of the transaction under the subchapter involved.

There is no dispute that the Commission approved the transactions in question under the relevant subchapter in *UP—Control—MP*, *supra*, including the MKT and DRGW trackage rights which are the subject of the instant litigation, and that the Commission's approval was affirmed in all material respects by the court below in *SPT*, *supra*.[7] Nor is there any dispute that petitioners below never raised before the Commission, in connection with agency approval of the involved transactions, any of the arguments subsequently presented to the Commission and to the court below in support of labor's position—that Commission approval of the MKT and DRGW trackage rights agreements (wherein it was clearly specified that the

[7] Under these circumstances, it is arguable, as petitioner argued in a motion to dismiss which was carried by the court below along for determination in connection with decision on the merits, that the petitions for review were time barred by virtue of not having been filed within 60 days of service of the Commission's decision approving the various transactions. For reasons set forth in footnote 4, *supra*, and footnote 9, *infra*, petitioner does not press this argument.

trackage rights tenants would have the right to use their own crews) did not foreclose the MP locals from their RLA rights to negotiate the crewing issue.

The only issue, therefore, is whether the Commission was required anticipatorily to make findings explaining why, if an issue such as that subsequently posited by the unions representing MP employees arose, it would be necessary to exclude resolution of that issue from the reach of the RLA in order for the statutory exemption from all other laws to take effect.

The majority below held that the Commission was required to do so.[8] Judge MacKinnon, dissenting, and the District Court, relying on the Eighth Circuit's contrary decision in *C&NW*, concluded otherwise, and in any event concluded that the Commission in connection with denial of clarification had adequately explained its position.[9]

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[8] In amending its decision so as to remand the matter to the agency rather than simply vacating the Commission's decision, the majority of the panel instructed the agency as to the sort of findings, that in its view are required (App. C 45a):

> The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted rights to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

[9] Viewed in the latter manner, there can be no doubt about the correctness of the majority's Hobbs Act timeliness ruling; but similarly, there can be no doubt that the issue of crewing was removed from the reach of the RLA, absent a showing of lack of nexus between the transaction approved and the relief from the operation of other laws such as that found in *City of Palestine Texas* v. *United States*, 559 F.2d 408 (1977).

No such showing was ever attempted here. Under long standing and well settled principles of judicial review, the burden was upon

(2) Not only the plain meaning of the statute but also its legislative history and Commission and court precedent demonstrate the incorrectness of the interpretation of Section 11341(a) adopted by the majority of the panel below. In connection with its approval of the underlying transactions out of which the instant disputes arose, the Commission explained its view of the statutory exemption provision as self executing and extending to relieving Commission approved consolidations from the provisions of the RLA, citing the Eighth Circuit's *CNW* decision. *UP—Control—MP*, 366 ICC at 556-557. Again, in this very proceeding, in explaining to BLE and UTU why reconsideration of denial of clarification was unnecessary, the Commission set forth in detail the basis for its view that approval of a transaction must permit changes in working conditions necessary to effectuate the approved transaction to be negotiated pursuant to the mechanisms provided for in its labor protective conditions, rather than pursuant to the RLA if the Commission's authority to approve such transactions is not to be vitiated (App. G 59a-60a). In addition, it explained, by reference to the *CNW* decision, why in its view making specific findings to this effect was not required either in general or in this proceeding (App. G 60a-61a).

Even more recently, the Commission explained in even greater detail in Finance Docket No. 30532, *Maine Central Railroad Company, Georgia Pacific Corporation, Canadian Pacific LTD. And Springfield Terminal Railway Company Exemption From 49 U.S.C. 11342 and 11343* (decided August 22, 1945) (Appeal pending in Docket No. 85-1636 *Railway Labor Executives' Ass'n and United Transportation Union* v. *United States and Interstate*

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the party seeking judicial review to establish the lack of a nexus, not upon the agency to establish a nexus as would be required by the remand instructions of the majority (quoted at n.8, *supra*). See *I.C.C.* v. *Jersey City*, 322 U.S. 503, 512-13 (1944) (ICC orders presumed valid).

Commerce Commission (D.C. Cir.)). (Attached as Addendum B.) why the provisions of the RLA must be deemed to be "reflected and subsumed in the conditions imposed by the Commission." (Add.B 49a) As explained by the Commission, such a result is essential if transactions approved by the agency are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. The decision explained that the Commission's labor protective conditions provide for compulsory binding arbitration,[10] whereas the RLA does not (Add.B 50a):

> Under RLA, however, changes in working conditions are generally classified as major disputes with the result that there is no requirement of binding arbitration. See *REA Express, Inc.* v. *B.R.A.C.*, 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unacceptable and inconsistent with section 11341 of our act and of Section 7 of the RLA which provides that arbitration awards thereunder may not diminish or extinguish any of our powers under the Interstate Commerce Act. [Footnote Eliminated]

The *C&NW* decision, *supra*, 314 F.2d 424, which petitioner believes is controlling, properly interprets the scope of former Section 5(11), presently Section 11341 (a), of the Interstate Commerce Act. That decision, as principally relevant to resolution of the matters presented in the instant controversy, held that (1) the Commission's power to approve consolidations includes the power to approve transactions which require the negotiation of changes in working conditions and to

[10] The majority below clearly recognized that compulsory binding arbitration was a central feature of the Commission's protective conditions (App. A, 6a).

establish the means by which negotiation of such changes shall be effected; (2) that, if the Commission does so, RLA processes for resolving labor problems arising directly out of the approved transactions are overridden by virtue of Section 5(11) (now Section 11341(a)); and (3) that the terms of that section are self executing so as to obviate the need for the Commission to declare that a carrier is being relieved from any particular restraints.

The court in *C&NW* found support for its conclusions in applicable legislative history of the Interstate Commerce Act and decisions of this Court interpreting the same (314 F.2d at 430-31). The court pointed out that Congress rejected the Harrington amendment which, if adopted, would have brought about a freeze of existing employee job rights and thereby would have threatened to prevent all rail consolidations, *Id.* at 430.[11] As further support for its conclusion, that court stated (*Id.* at 431):

> Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

See also *Nemitz* v. *Norfolk and Western Railway Co.*, 287 F. Supp. 221, at 226-227 (U.S.D.C. N.D. Ohio 1968); and *Nemitz* v. *Norfolk and Western Railway Company*, 436 F.2d 841 at 845 (6th Cir. 1971), *affirmed* in *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971).

[11] Most particularly the *C&NW* decision relied upon this Court's holding in *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. 169 (1961) that examination of the legislative history of former section 5(2)(f) (now 49 U.S.C. 11347) supports the Commission's position that no freeze of existing working conditions of the sort that would have been provided by the Harrington Amendment was contemplated by that Section.

Similarly, as Judge MacKinnon noted with approval in adopting the reasoning of that decision (App. A 41a) the District Court in *Missouri, supra* (580 F.Supp. at 1505; Add. A 28a), founded its decision enjoining the threatened strike by MP employees over the crewing issue on the basis that:

> allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Such a result, of course, is invited by the decision of the majority of the panel of the court of appeals herein.

(3) The majority of the panel of the court of appeals in a footnote rejected the previously unassailed holding of *C&NW* (App. A 18a n.6):

> The government claims that *C&NW* stands for the proposition that the immunity is automatic and requires no finding of necessity. However, *C&NW* fails to carry the day for several reasons. First, *C&NW* itself recognized that immunity attached only to obstacles that would frustrate fruition of the merger. *Id.* at 432. Second, *C&NW* distinguished, but did not disagree with, *Texas & New Orleans R. Co.* v. *Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). 314 F.2d at 433. And third, *C&NW* did say that no statement of necessity was required. *Id.* at 432. To the extent that *C&NW* may be read to say that ICC need supply no *basis* for the necessity determination, we find the interpretation ill conceived and reject it.[12]

Because of the court of appeals majority's rejection of *C&NW*, there is now a split in the Circuits on the

[12] The majority of the panel in its decision relies heavily upon *Texas & New Orleans Railroad Co.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962). That case recognized that ". . . . Section [11341(a)] relieves carriers of the restraints and limitations of other laws" (*Id.* at 156) and that "if it

important issue of the self-executing nature of Section 11341(a) of the Interstate Commerce Act and its relationship with other laws in general and the RLA in particular.

(4) The holding of the majority of the panel has already created a chaotic situation with respect to labor relations in the railroad industry.[13] More importantly

should be determined that the Commission's authority under Section [11343] is being frustrated by application of Norris-LaGuardia to the present suit we would have to conclude that Norris-LaGuardia was preempted." (*Id.* at 158). Here, for reasons set forth by Judge MacKinnon in his dissenting opinion (App. A 38a-41a) and the District Court's *Missouri* decision (Addendum A), it is clear that permitting negotiation under the RLA with a concomitant right to strike over crewing of trackage rights operations by MKT and DRGW would frustrate the Commission's approval of the proposed consolidation. Accordingly, under even the authority relied upon by the majority of the panel, the Commission's decisions under review ought to have been affirmed.

[13] Besides *Missouri, supra*, labor unions have filed suits in various forums throughout the United States which claim that the RLA procedures must be followed before changes in working conditions contemplated by various Commission approved transactions can be effected. The following are a few examples of pending cases which raise this issue:

(1) No. 85-3875, *RLEA* v. *Butte, Anaconda and Pacific Railway, Company*, (U.S.C.A., 9th Cir.) (Union contends that the railroad must follow RLA procedures before making changes in working conditions resulting from the sale of rail properties to the State of Montana which, in turn, leased such properties to a non-carrier);

(2) No. 85-7483, *RLEA* v. *Staton Island Railroad Corp., Et Al.* (U.S.C.A., 2d Cir.) (Appeal of District Court dismissal of a case wherein the Union contended that RLA procedures must be followed in an approved transaction involving the sale of rail properties under Section 10905;

(3) No. 85-C-7538, *RLEA, Et Al.* v. *Soo Line Railroad Company and the Milwaukee Road, Inc.* (U.S.D.C. N.D. Ill.) Unions claim railroads must follow the RLA procedures before making changes in working conditions resulting from the Soo Line Railroad's acquisition of the core rail

from the Commission's perspective, if applied to potential conflicts with other laws (there is every reason to suppose it will be in view of the broad language used by the majority), the interpretation adopted by the majority will severely curtail, if not paralyze, the Commission's exercise of its jurisdiction to approve rail consolidations. As the majority itself acknowledged (App. A 16a, n.4):

> A requirement . . . [that the ICC must enumerate every legal obstacle that is waived in its approval] . . . might undermine the approval authority's purpose of "facilitat[ing] merger and consolidation in the national transportation system," *County of Marin* v. *United States*, 356 U.S. 412, 416 (1958), because some legal obstacles to fruition of the transaction may not be entirely foreseeable at the time of approval. But the ICC's decisionmaking process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction.

However, the Court's holding—that the determination of which obstacles the agency is required to foresee and waive before the approved transaction surmounts them is a matter for the courts to determine after the fact—imposes the very obligation on the agency which the Court found would undermine the agency's exercise of its consolidation authority. In the absence of any suggestion by any party before the agency that an obstacle is present, the holding of the majority creates an impossible situation because it requires the agency to foresee

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properties of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company; and

(4) No. 84-3703-T, *International Association of Machine and Aerospace Workers* v. *Boston & Maine Corp., Et Al.* (U.S.D.C. Mass.) (Unions assert the right to bargain collectively over changes in working conditions resulting from Commission approval of Guilford Transportation Industries, Inc.'s control of the Boston & Maine Railroad.

and make findings with respect to *all* conceivable obstacles before they are removed as impediments. Neither the agency nor the industry regulated by it can, or should be required to, live with the uncertainty attendant upon such an approach.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission

NOVEMBER 1985

ADDENDUM A

UNITED STATES DISTRICT COURT
E.D. MISSOURI, E.D

No. 83-771C(1)

MISSOURI PACIFIC RAILROAD COMPANY, PLAINTIFF

and

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
INTERVENOR-PLAINTIFF

v.

UNITED TRANSPORTATION UNION,
GENERAL COMMITTEE OF ADJUSTMENT, ET AL.,
DEFENDANTS

March 1, 1984

Nina K. Wuestling Mark M. Hennelly, St. Louis, Mo., for plaintiff.

John Clarke & John J. Sullivan, Washington, D.C., Joe C. Crawford, Dallas, Tex., David R. Herndon, E. Alton, Ill., Charles Allen Seigel, St. Louis, Mo., for defendants.

MEMORANDUM

NANGLE, Chief Judge.

This case is now before this Court on the motion of plaintiff Missouri Pacific Railroad Company (herein-

after "MOPAC") and intervenor-plaintiff Missouri-Kansas-Texas Railroad Company (hereinafter "KATY") for a preliminary injunction enjoining defendants and their members from striking either railroad.[1] In addition, there are several other motions which are now pending before this Court. These include: 1) defendants' motion to refer two (2) issues to the Interstate Commerce Commission pursuant to 28 U.S.S. § 1336(b); 2) plaintiffs' motions for summary judgment on its complaint and dismissal of or summary judgment on defendants' counterclaims; and 3) defendants' cross-motion for summary judgment on plaintiffs' complaint.

I MOTION FOR PRELIMINARY INJUNCTION

The motion for a preliminary injunction was submitted to this Court on a stipulated record consisting of the following: 1) a stipulation of fact[2]; 2) the affidavit

[1] On February 7, 1984, this Court granted plaintiffs' motion for a preliminary injunction. At that time this Court issued a very brief memorandum which stated in summary fashion the reasons for granting plaintiffs' motion. This Court indicated that a more complete and detailed explanation of this Court's ruling would be forthcoming. The memorandum filed herein this day is the memorandum promised. However, in addition to discussing plaintiffs' motion for a preliminary injunction, this memorandum addresses the pending motions for referral to the Interstate Commerce Commission and for summary judgment.

[2] The manner in which the parties developed the record for this motion was poor to say the least. As stated in this Court's *Memorandum* dated February 7, 1984, the parties stipulated to a record in this case during an in-chambers conference, held on-the-record, on February 1, 1984. It was represented that a so-called "Stipulation of Fact" existed and had been filed along with the parties' pre-trial material. The file contained a document captioned "Stipulations", which had been filed by plaintiffs, and it contained the signatures of counsel for MOPAC and KATY only. It did not contain the signature of any representative of UTU. It was not until February 6, 1984, that this Court received and filed a copy of the "Stipulations" with a signature of counsel for UTU on it. However, even this document does not contain the signature of KATY's counsel. This Court assumes that, given the fact that counsel for KATY's signature appears on a copy of this document elsewhere in the file, it is a valid and binding stipulation of fact.

of Irving Newcomb which, *inter alia*, attests to the accuracy of the facts stated in defendants' (hereinafter "UTU") "Statement of Facts" contained in *Memorandum of Defendants in Support of Their Cross-Motion To Dismiss, etc.* at 2-12; and 3) the affidavit of O.B. Sayers which, *inter alia*, attests to the accuracy of the facts stated in plaintiff MOPAC's "Background Facts" contained in *Memorandum of Plaintiff Missouri Pacific Railroad Company In Support of Its Motions, etc.* at 4-8. In addition, this Court takes judicial notice of the orders of the Interstate Commerce Commission (hereinafter "ICC") entered in connection with the application of MOPAC to consolidate with the Union Pacific Railroad Company (hereinafter "UPRR"). *Fed.R.Ev.* 201. This Court, having considered the record in this case, the pleadings, briefs and exhibits submitted in support of and in opposition to the motion for a preliminary injunction, hereby makes the following findings of fact and conclusions of law.

A. FINDINGS OF FACT

1. Plaintiff MOPAC is a common carrier regulated by the Interstate Commerce Commission ("ICC"). MOPAC offers rail freight transportation over 11,500 miles of railroad; its principal north-south lines extend to Louisiana and Texas from Chicago via St. Louis and from Omaha via Kansas City.[3]

2. Intervenor KATY is a common carrier regulated by the ICC. KATY offers rail freight transportation

[3] Paragraphs 1 through 13 of these "Findings of Fact" are substantially verbatim portions of the "Stipulation" signed by the parties. MOPAC is sometimes referred to as "MPRR" or "MP" and KATY is sometimes referred to as "MKT".

over 2,100 miles of railroad; its major lines serve San Antonio, Houston and Galveston. Until January, 1983, the northern-most points served by KATY were St. Louis and Kansas City.

3. Defendant UTU is a railway labor organization duly authorized, under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, to represent certain employees of MOPAC and KATY who are members of the crafts or classes of conductors, brakemen, yardmen, firemen, hostlers and helpers. All other defendants are agents and officials of UTU and/or the General Committee of Adjustment for MOPAC.

4. MOPAC has several agreements with UTU that govern certain rates of pay, rules and working conditions of UTU members employed by MOPAC. One agreement, last rewritten December 1,1982, applies to the crafts or classes of locomotive firemen, hostlers and hostler helpers; a second agreement, last rewritten September 1, 1979, applies to the crafts or classes of conductors, trainmen and yardmen.

5. On September 15, 1980, UPRR and MOPAC submitted to the ICC applications for approval of their proposed consolidation. These applications were submitted pursuant to the Interstate Commerce Act, 49 U.S.C. § 11344. From March, 1981, until January, 1982, the ICC held extensive hearings on these applications.

6. UTU participated in the ICC proceedings, opposing the applications and seeking conditions that would protect railroad employees affected by the transportations. KATY participated in the proceedings and opposed the consolidation; alternatively, if the consolidation were approved, KATY sought "trackage rights" that would allow it to operate over MOPAC tracks between, among other points, Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *See* ICC Finance Docket 30,000 (Sub-No. 25). MOPAC opposed the trackage rights condition sought by KATY. The

trackage rights application of KATY was filed in January of 1981 and the proposed trackage rights agreement included therein provided: "MKT, with its own employees, at its sole cost and expense, *shall* operate its engines, cars and trains on and along Joint Track." *See* F.D. No. 30,000 (Sub-No. 8) *et al.* (October 19, 1983), at 8 (emphasis added).

7. By decision and order dated October 20, 1982, the ICC approved the consolidation of UPRR and MOPAC, as well as the application of KATY for trackage rights, over MOPAC lines between Kansas City, on the one hand, and Council Bluffs, Iowa, Omaha, Union, Lincoln and Atchison, Nebraska, and Topeka, Kansas, on the other hand. *Union Pacific Corp., et al.—Control—Missouri Pacific Corp.*, 366 I.C.C. 459, 642, 653 (1982); *pet. for rev. pending*, D.C.Cir. Nos. 82-2253, *et al.* The ICC's Order provided that the trackage rights, which it concluded were necessary to ameliorate competitive effects of the approved consolidation, would be effective immediately upon consummation of the consolidation. The ICC's Order did not specify compensation terms, but allowed the parties to negotiate such terms. In a recent decision of the ICC, Finance Docket No. 30,000 (Sub-No. 25), the ICC recognized that it has plenary authority to impose such trackage rights under the Interstate Commerce Act, 49 U.S.C. § 11341, *et seq.*

8. The ICC's Order approving the trackage rights requested by KATY in F.D. 30,000 (Sub-No. 25) provided that the trackage authority was "subject to employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.-Trackage Rights-BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.-Lease and Operate*, 360 I.C.C. 653, 664 (1980)." 366 I.C.C. at 654 (¶ 19). These conditions are commonly referred to in the railroad industry as the "Norfolk and Western" conditions (hereinafter "N & W").

9. On November 9, 1982, UPRR, MOPAC and KATY filed with the ICC a "Stipulation" reflecting their agree-

ments in principle on the terms and conditions of the anticipated trackage rights operations (other than permanent compensation terms). The Stipulation provided that "the parties will enter into a standard form trackage rights agreement to implement KATY's trackage rights."

10. The consolidation of UPRR and MOPAC was effected on December 22, 1982. By letter dated December 31, 1982, MOPAC advised the General Chairman of UTU, among others, that KATY was expected to initiate trackage rights operations on January 3, 1983, and that "[n]o Missouri Pacific employees will be adversely affected as a result of the utilization of these trackage rights . . . ." In response, R.D. Hogan of UTU sent a letter dated January 4, 1983, to O.B. Sayers of MOPAC, which stated in part:

> The Katy Railroad has no terminals north of Kansas City, Missouri and prior to this time has not handled any service beyond that point. This service has traditionally been handled by the employees we represent on the Missouri Pacific (Proper) Railroad, and it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected by Missouri Pacific (Proper) road crews. Request is hereby made that such service be protected as indicated above.

11. On January 5, April 11 and April 13, 1983, the KATY entered into separate agreements with representatives (the UTU) of its engine and train service employees concerning the implementation of the trackage rights over MOPAC's track as authorized in Finance Docket 30,000 (Sub-No. 25).

12. KATY, using KATY employees, initiated operations over the trackage rights on or about January 6, 1983. KATY is presently using its own employees to

pickup and set-out rail cars at Atchison and Union, Nebraska and at Council Bluffs, Iowa.

13. The formal terms and conditions (other than the terms of the compensation owed MOPAC for KATY's trackage rights) are set forth in a standard form trackage rights agreement filed with the ICC March 9, 1983 ("the Trackage Rights Agreement"). The Trackage Rights Agreement recognizes that KATY "shall, with its own employees, at its sole cost and expense, operate its trains, locomotives and cars over" MOPAC's Omaha-Kansas City line.

14. By Mailgram dated March 28, 1983, and directed to MOPAC, UTU officials Newcomb and Hogan stated, as follows:

> The undersigned representing conductors, road brakemen, yardmen, firemen, hostlers, and hostler helpers on the Missouri Pacific (proper) have exhausted our patience and goodwill in attempting to have you stop the use of MKT employees manning freight over Missouri Pacific lines between Kansas City and Omaha. This will serve as notice that if arrangements are not made to halt this trespass on our collectively bargained agreements and our seniority by non-Missouri Pacific employees, the employees under the jurisdiction of our committees will peacefully withdraw from service on those parts of the Missouri Pacific Railroad under our jurisdiction at 12:01 AM April the 4th 1983.

15. On March 30, 1983, MOPAC filed its complaint, against the UTU and several of its officers, under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.*, seeking declaratory and injunctive relief against the threatened strike. On the same day this Court granted a Temporary Restraining Order prohibiting defendants from engaging in any strike or related activities against plain-

tiff. Thereafter, KATY intervened as a plaintiff and joined in MOPAC's request for relief. The UTU also filed a counterclaim against MOPAC and KATY alleging, in two (2) counts, that MOPAC violated the Railway Labor Act and that MOPAC and KATY violated the terms of the ICC's Order approving the application of KATY for trackage rights. The Temporary Restraining Order was extended beyond the ten (10) day limit of Rule 65(b), *Fed.R.Civ.P.* 65(b), several times by agreement of the parties. The last such extension expired at 10:00 A.M. on February 7, 1984.

16. MOPAC has numerous trackage rights arrangements whereby other carriers, including KATY, operate over its lines and whereby MOPAC operates over the lines of other carriers, including KATY.

17. Article 1, § 4 of the N & W conditions provides, in pertinent part, as follows:

> When the railroads contemplate a transaction, they shall give at least twenty (20) days' written notice of such intended transaction . . . .
>
> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to application of the [N & W conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice. Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

354 I.C.C. at 610-611. With respect to KATY's trackage rights over MOPAC lines, neither MOPAC nor KATY

gave the notice called for by Art. I, § 4, to MOPAC employees. However, several conferences concerning the grant of trackage rights to KATY were held between, *inter alia*, Irving Newcomb for UTU and O.B. Sayers for MOPAC. These conferences occurred between January 4, 1983, and March 28, 1983. According to Mr. Newcomb, at a conference held on March 7, 1983:

> [T]he UTU requested MoPac to negotiate with the UTU regarding (1) the transfers to MKT of the right to operate over MoPac tracks to perfrom work previously performed by MoPac operating employees, and (2) the effects of such a transfer of operating rights on MoPac employees represented by UTU.

Off. of I. Newcomb, ¶ 3. Mr. Newcomb states that MOPAC refused this request, relying upon actions and orders of the ICC. *Id.*

18. On May 12, 1983, the ICC isused a decision denying the petition of the Brotherhood of Locomotive Engineers (hereinafter "BLE") for clarification of the ICC's decision approving the consolidation of UPRR and MOPAC. F.D. No. 30,000 (Sub-No. 18) *et al.* (May 12, 1983). The ICC summarized the position of BLE, as follows:

> BLE seeks to have the consolidation decision clarified with respect to whether MKT . . . may use their own operating crews in performing trackage rights operations over MP lines. It asserts that this commission has no jurisdiction over crew assignment matters and that our decision should not be construed as authorizing MKT . . . to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision

approving the responsive trackage rights applications.

Id. at 2-3. In denying BLE's petition the ICC stated:

> Inasmuch as . . . MKT proposed in [its] applications that the operations would be performed with [its] own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.

Id. at 4. Moreover, the ICC added:

> We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews.

Id. at 5.

19. On June 16, 1983, UTU sent a letter to several carriers, including MOPAC and KATY, requesting that those carriers "comply fully with [the] advance notice and negotiation requirements" of Art. I, § 4 of the N & W conditions.

20. MOPAC rejected UTU's request in a letter dated June 23, 1983. MOPAC interpreted UTU's letter as a request to enter into negotiations aimed at reaching a "single implementing agreement" with respect to the selection of forces for trackage rights tenants. MOPAC, relying on the May 18, 1983, order of the ICC which "confirm[ed] the inability of MPRR and UPRR to bind their trackage rights tenants to an agreement regarding selection of forces", stated that "it would be inappropriate and unproductive for MPRR and UPRR to participate in" a meeting or negotiations aimed at reaching such an agreement. However, MOPAC's letter did express a willingness to negotiate with UTU "issues of

mutual interest arising from the recently approved consolidations . . ."

21. KATY responded to the UTU in a letter dated June 22, 1983. KATY also rejected the UTU's request, relying on the ICC's orders and the fact that it had already met and negotiated implementing agreements with its own employees who are represented by the UTU.

22. On June 29, 1983, the UTU filed a pleading with the ICC which sought reconsideration of the ICC's May 18, 1983, denial of the petition for reconsideration. In that pleading the UTU asked the ICC to rule:

> [T]hat its prior orders (1) did not select the forces to perform the trackage rights operations, (2) did not receive the carriers of their obligations under the Railway Labor Act to avoid unilateral changes of working conditions, and (3) did not relieve the carriers of their obligations to comply with the notice and negotiation provisions of the employee protective provisions imposed in the sub-proceedings at bar to protect the interests of MP employees affected by those transactions.

23. The ICC rejected *all three* of the UTU's arguments in a decision dated October 19, 1983. F.D. No. 30,000 (Sub-No. 18) *et al.* (October 19, 1983). The ICC stated:

> Petitioners contend that UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Id. at 4-5. The ICC further concluded that:

> Provisions of trackage rights agreements designating which carrier's employees will perform trackage

rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision.

24. The strike threatened by UTU will cause a disruption of service to MOPAC and its shippers, and result in severe, immediate and irreparable injury to MOPAC. MOPAC, which operates over 3,400 trains per week, carrying 2,300,000 tons of freight, would be placed in serious jeopardy by the threatened strike. The injury to MOPAC's thousands of shippers, especially those exclusively served by MOPAC, would be irreparable. *Aff. of O.B. Sayers*, ¶ 4.

B. CONCLUSIONS OF LAW

1. INTRODUCTION

This action arises under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, and the Interstate Commerce Act, 49 U.S.C. § 11341 *et seq.* This Court has subject matter jurisdiction under 28 U.S.C. § 1331(a) and 1337.

Plaintiff and plaintiff-intervenor's complaints seek preliminary and permanent injunctive relief against defendants' threatened strike. Plaintiffs contend in their complaints that the dispute which gives rise to this action concerns the interpretation and application of the collective bargaining agreements between MOPAC and UTU. According to plaintiffs, the dispute is therefore a "minor" dispute within the meaning of the RLA and defendants are required by § 153 of the RLA to submit the dispute to the exclusive jurisdiction of the National Railway Adjustment Board (NRAB) rather than strike. Plaintiffs also allege that defendants' strike would violate § 152, First of the RLA, which requires carriers and

employee representatives to exert every reasonable effort to settle disputes, because defendants failed to invoke the binding arbitration provisions of the employee protective conditions that were imposed by the ICC. *See Finding of Fact No. 8.* Additionally, plaintiffs contend that defendants' proposed strike action is barred by the doctrines of estoppel, collateral estoppel, and res judicata.[4]

Defendants counterclaimed for declaratory and injunctive relief. In Count I of their counterclaim defendants allege that MOPAC violated § 156 of the RLA by unilaterally changing the actual and objective working conditions of its employees, i.e., by authorizing KATY to operate over MOPAC tracks with KATY crews, without complying with the notice and negotiation requirements of § 156. In Count II defendants allege that both MOPAC and KATY violated Article 1, §§ 2 and 4 of the N & W conditions imposed by the ICC, *see Finding of Fact No. 8*, by not preserving working conditions that prevailed prior to the transaction (Art. 1, & 2), and by failing to give twenty (20) days prior notice and to negotiate over the selection of forces to operate the trackage rights (Art. 1, § 4). Defendants seek an injunction requiring plaintiffs to restore the status quo that existed prior to the trackage rights transfer, prohibiting trackage rights operations until plaintiffs comply with Article 1, section 4 of the N & W conditions, and making all employees whole for their losses due to plaintiffs' alleged infractions.

Plaintiffs' motion for a preliminary injunction against defendants' proposed strike presents a unique and com-

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[4] This Court declines to express an opinion as to the merits of these claims. The record on these questions is not adequate to make any findings concerning the collateral estopel or res judicata effect of the ICC proceedings in the case at bar. The same is true of the estoppel and bar claim. Moreover, this Court's disposition of plaintiffs' other claims herein makes it unnecessary for this Court to determine these questions at this time.

plex problem. The decision whether to enjoin defendants' threatened strike requires this Court to reconcile several federal statutes: 1) the Norris-LaGuardia Act (hereinafter the "NLGA"), 29 U.S.C. § 101 *et seq.*; 2) the Railway Labor Act (hereinafter the "RLA"), 45 U.S.C. § 151 *et seq.*; and 3) the Interstate Commerce Act (hereinafter the "ICA"), 49 U.S.C. § 11341 *et seq.* Essentially, defendants argue that the NLGA deprives this Court of the power to issue an injunction against defendants' threatened labor strike. Because this Court declines to read the NLGA in a vacuum, defendants' argument must be rejected. This Court will first address the NLGA problem and then will analyze the four (4) traditional criteria for determining whether preliminary injunctive relief is warranted.

2. DOES THE NORRIS-LaGUARDIA ACT BAR A LABOR INJUNCTION IN THIS CASE?

Section 104 of the NLGA provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment; . . . .

29 U.S.C. § 104. In addition, § 108 of the NLGA provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute

> either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

29 U.S.C. § 108. Defendants contend that § 104 deprives this Court of jurisdiction to enjoin defendants' threatened strike. Alternatively, defendants argue that if this Court does have jurisdiction to enjoin defendants' threatened strike, then injunctive relief must be denied because plaintiffs have not met the requirements of § 108.

Plaintiffs respond that the underlying labor dispute is a "minor" dispute within the meaning of the RLA and, therefore, the NLGA is no bar to the power of this Court to enjoin defendants' threatened strike. Alternatively, plaintiffs argue that if the underlying labor dispute is a "major" dispute within the meaning of the RLA, then plaintiffs are exempt, under the ICA, from any duty to negotiate with defendants concerning crew selection for KATY's trackage rights and the NLGA must give way to the power and jurisdiction of the ICC in this situation. Plaintiffs do not specifically address defendants' § 108 argument.

As stated in this Court's order of February 7, 1984, and as explained more fully below, this Court holds that: 1) this is a "minor" dispute within the meaning of the RLA, and, therefore, § 104 of the NLGA does not bar a labor injunction; 2) alternatively, if this is a "major" dispute within the meaning of the RLA, defendants' proposed strike would be illegal because plaintiffs have no duty to negotiate with defendants concerning crew selection for KATY's trackage rights, and § 104 of the NLGA must give way to the ICC's power to determine labor disputes in connection with consolidation and trackage rights proceedings; and 3) § 108 of the NLGA does not prevent the issuance of a preliminary injunction because plaintiffs have not violated its provisions. Each of these three (3) will be discussed in turn below.

a. THIS IS A "MINOR" DISPUTE AND THE NORRIS-LaGUARDIA ACT DOES NOT BAR A LABOR INJUNCTION

The RLA, which governs labor relations in the railroad industry, draws a signficant distinction between "minor" disputes and "major" disputes. In an often-quoted passage, the Supreme Court described the distinction, as follows:

> [Major disputes] relate . . . to disputes over the formation of collective bargaining agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one, and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.
>
> [Minor disputes], however, contemplate . . . the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. . . . In either case the claim is to rights accrued, not merely to have ones created for the future.

Elgin, Joliet & Eastern Railway Co. v. Burley, 325 U.S. 711, 723, 65 S.Ct. 1282, 1290, 89 L.Ed. 1886 (1945). *See also Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co.*, 353 U.S. 30, 33, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957); *Chicago and Northwestern Transportation Co. v. United Transportation Union*, 656 F.2d 274, 277-78 (7th Cir. 1981); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971). The distinction between the two types of disputes is significant because it

affects the procedure for settling disputes and the applicability of the NLGA's prohibition against federal court labor injunctions.

If a dispute is a "minor" dispute and it cannot be resolved by the normal grievance procedure, then the parties must submit their differences to the NLRB, the jurisdiction of which is exclusive. *Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. For this reason, a strike over "minor" disputes violates the RLA and may be enjoined by a federal district court, the prohibitions of the NLGA notwithstanding. *Locomotive Engineers v. Louisville & Nashville Railroad Co.*, 373 U.S. 33, 83 S.Ct. 1059, 10 L.Ed.2d 172 (1963); *Chicago River*, 353 U.S. at 40-42, 77 S.Ct. at 640-641; *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. On the other hand, "[i]f the dispute is 'major', . . . the union may strike to secure its position if after negotiation between the parties, mediation by the National Mediation Board, and, possibly, a review and report by an emergency board appointed by the President, a settlement is not reached." *Chicago and Northwestern Transportation Co.*, 656 F.2d at 277. *See also Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 314 F.2d 424, 431 (8th Cir.), *cert. denied*, 375 U.S. 819, 84 S.Ct. 55, 11 L.Ed.2d 53 (1963).

Strikes over "minor" disputes may be enjoined despite the NLGA, because such strikes violate the mandate of the RLA that such disputes be conclusively resolved through the NRAB machinery created by the RLA. In *Chicago River* the Supreme Court held that the earlier and general provisions of the NLGA must be accommodated to the later and more specific provisions of the RLA. 353 U.S. at 40-42, 77 S.Ct. at 640-641. The Court also explained that the NLGA prevents the issuance of an injunction against a railway labor strike over a "major" dispute, because the RLA "does not provide a process for a final

decision like that of the Adjustment Board in a 'minor dispute' case." *Id.* at 42 n. 24, 77 S.Ct. at 641 n. 24.

In the case at bar the underlying labor dispute is a "minor" dispute. The essential test is whether the dispute "evolv[es] from the bargaining process for a new or altered contract," or whether the dispute is "over the meaning of an existing collective bargaining agreement." *Id.* Here, the strike threat mailgram from UTU is the best indication that the dispute is the latter rather than the former. UTU's mailgram demanded a halt to MOPAC's "trespass on our collectively bargained agreements and our seniority." *Finding of Fact No. 14.* UTU's reliance on the collective bargaining agreements and the seniority provisions therein lead to the conclusion that the dispute is arguably and reasonably susceptible to resolution by reference to the contracts between the parties. *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 655 F.2d 155, 158-59 (9th Cir. 1981); *United Transportation Union v. Burlington Northern, Inc.*, 458 F.2d 354, 357 (8th Cir. 1972); *International Brotherhood of Teamsters, etc. v. Braniff International Airways, Inc.*, 437 F.2d 1272, 1274 (5th Cir. 1971).

UTU argues that the reference in the mailgram to the exhaustion of UTU's "patience and goodwill in attempting to have [MOPAC] stop the use of MKT employees" on KATY trains running over MOPAC lines, makes this a "major" dispute. *Finding of Fact No. 14.* UTU contends that this refers to efforts to negotiate a new contract or to change the existing collective bargaining agreement. However, the language relied upon is ambiguous at best and does not deviate from the basic position of UTU expressd in the mailgram—that MOPAC is breaching the collective bargaining agreements *currently in effect* by allowing KATY employees to operate KATY's trackage rights over MOPAC lines. The language relied upon by UTU does not convince this Court that what UTU was

actually trying to do was to bargain for a new or altered contract.

UTU next argues that the allegations in its counterclaim make this a "major" dispute. In ¶ 9 of UTU's counterclaim against MOPAC, UTU alleges that an "actual and objective working condition" of the relationship between MOPAC and UTU was that trains operating over MOPAC tracks or serving customers on those tracks be manned by MOPAC crews. UTU further alleges that MOPAC unilaterally changed that working condition by allowing KATY crews to operate KATY trains on MOPAC lines. *Counterclaim ¶ 14.* The UTU contends that this creates a "major" dispute because MOPAC violated § 152, Seventh [5] and § 156 [6] of the RLA by making such changes without following the procedure in § 156. 45 U.S.C. § 152, Seventh; § 156.

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[5] 45 U.S.C. § 152, Seventh, provides:

> Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

[6] 45 U.S.C. § 156, provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended (change in agreements) affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended changes has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

The law is clear that a change in "working conditions" which violates § 152, Seventh and § 156, is a "major" dispute where the contract involved is not "reasonably susceptible" to an interpretation that the change is justified or permitted by the contract. *Trans World Airlines*, 655 F.2d at 157-59. *See also Burlington Northern*, 458 F.2d at 357; *Braniff International Airways*, 437 F.2d at 1274. However, this rule is not applicable here, where the ICC's approval of the trackage rights arrangement exempts MOPAC from its duty under § 152, Seventh and § 156, at least with respect to the crewing provisions of the trackage rights agreement.

The ICC's exemption power is found in § 11341(a) of the Interstate Commerce Act, which provides, in pertinent part:

> The authority of the Interstate Commerce Commission under this subchapter is exclusive. . . . A carrier, corporation, or person participating in [an] approved or exempted transaction *is exempt* from the antitrust law and *from all other law*, including State and municipal law, *as necessary to let that person carry out the transaction*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

49 U.S.C. § 11341(a). The exemption provided by § 11341(a) is self-executing, *Chicago and Northwestern Railway Co.*, 314 F.2d at 432, but here the ICC twice made it clear that MOPAC and KATY are exempt from any requirements of the RLA concerning the crew selection clause in the approved trackage rights agreement. *See Findings of Fact Nos. 18, 22, 23. See Chicago & North Western Railway Co.*, 314 F.2d at 431-32 (no express or implied exception of RLA provisions from ICC exemption power).

It is the opinion of this Court that § 11341(a) exempts MOPAC from any duty under RLA § 152, Seventh or § 156 concerning the use of KATY employees on MOPAC

lines. *See also* Part I, 2, b, *infra*. UTU argues that this Court must make a *de novo* determination of whether such an exempiton is "necessary to let [MOPAC] carry out the transaction. . . ." 49 U.S.C. § 11341(a). Although such a determination may be necessary where the ICC has failed to expressly make any findings concerning exemption, *see Chicago and Northwestern Railway Co.*, 314 F.2d at 432, it is not necessary here where the ICC has expressly relieved MOPAC from the obligations of the RLA. To the extent the UTU challenges this action of the ICC, it may not do so in this forum. The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC. 28 U.S.C. § 2342. UTU's reliance on *Texas and New Orleans Railroad Company v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952, 83 S.Ct. 508, 9 L.Ed.2d 500 (1963), *reh. denied*, 375 U.S. 871, 84 S.Ct. 28, 11 L.Ed.2d 101 (1963), is misplaced, because in that case there was no express finding by the ICC that the provisions of the RLA should be exempted. Moreover, to the extent that *Texas and New Orleans Railroad* stands for the proposition that § 11341(a) cannot operate to relieve a carrier of its obligations under the RLA, this Court respectfully rejects that proposition.

Finally, UTU argues that this dispute cannot be considered a "minor" dispute, because if MOPAC is exempt from the requirements of the RLA, then MOPAC cannot be required to submit this dispute to a final and binding decision by the NRAB. More importantly, UTU argues that because MOPAC need not submit the dispute to the NRAB, the rationale for excepting strikes over "minor" disputes from the prohibitions of the NLGA is absent, and, therefore, the NLGA applies to prohibit an injunction against the threatened strike. This is an interesting argument, but it is the opinion of this Court that, assuming MOPAC is exempt from the RLA requirement that

"minor" disputes be submitted to the NRAB, it does not follow that the rationale for excepting "minor" disputes from the prohibitions of the NLGA is absent.

The rationale is not absent, because the ICA provides "a process for a final decision," *Chicago River*, 353 U.S. at 42 n. 24, 77 S.Ct. at 641 n. 24, and here the ICC rendered a final decision as to the validity of KATY's use of KATY employees to operate its trackage rights. In *Chicago and North Western Railway Co.*, the Eighth Circuit made it clear that the ICC has jurisdiction to determine labor disputes, whether "minor" or "major", in connection with its power to approve mergers and consolidations. 314 F.2d at 431. Here the ICC resolved the crew selection question against UTU, and to that extent the jurisdiction of the NRAB is displaced. Just as the NLGA is excepted to enforce the labor jurisdiction of the NRAB, in this case the NLGA is excepted to enforce the labor jurisdiction of the ICC.[7]

In sum, this is a "minor" dispute and § 104 of the NLGA does not deprive this Court of jurisdiction to enjoin defendants' threatened strike.

b. EVEN IF THIS IS A "MAJOR" DISPUTE, THE PROHIBITIONS OF THE NORRIS-LaGUARDIA ACT ARE DISPLACED BY THE POWER AND JURISDICTION OF THE ICC UNDER THE INTERSTATE COMMERCE ACT

This Court finds it necessary to rest this Court's conclusion that the NLGA does not prevent an injunction against UTU's threatened strike from issuing, upon an

[7] It may be argued that the analogy between the NRAB jurisdiction over "minor" labor disputes and the ICC jurisdiction over labor disputes is not perfect as it relates to the NLGA, because the ICA was not "adopted as a part of a pattern of labor legislation." *Chicago River*, 353 U.S. at 42, 77 S.Ct. at 641. This argument is dealt with in section b, *infra*.

alternative basis: Even if this is a "major" dispute, MOPAC was exempted from any RLA duty to negotiate over the selection of crews and the NLGA must give way to protect the integrity of the jurisdiction and orders of the ICC under the ICA.

As discussed *supra*, it is the opinion of this Court that MOPAC is exempted under § 11341(a) of the ICA, 49 U.S.C. § 11341(a), from the requirements of the RLA with respect to "major" disputes. RLA § 156 imposes a duty on carriers to negotiate over certain "major" disputes. 45 U.S.C. § 156. It is easy to see why it is necessary that MOPAC be exempted from that duty, insofar as it relates to UTU's demand that MOPAC negotiate over the selection of forces to operate KATY trains on MOPAC lines. There is nothing that UTU/MOPAC negotiations could do to change the crew selection provisions approved by the ICC. Under the ICA the ICC has authority to approve transactions, including trackage rights agreements, between carriers. 49 U.S.C. § 11341 *et seq.* Here the ICC expressly and emphatically stated that "[p]rovisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and *may be implemented without further approval.*" F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983), at 15 (emphasis added). *See Finding of Fact No. 23.* MOPAC cannot unilaterally change a material term of a trackage rights agreement approved by the ICC and therefore MOPAC was immune from any requirement of the RLA to negotiate over such a material term.[8] *Norfolk & West-*

[8] UTU argues that § 11347, 49 U.S.C. § 11347, which provides that "[n]otwithstanding this subtitle, the arrangements [to impose employee protective conditions] may be made by the rail carrier and the authorized representative of its employees," authorizes MOPAC and UTU to negotiate over the crew selection issue. However, the crew selection clause in the trackage rights agreement is a material term of the agreement which the ICC approved and is not one of the employees protective conditions that may be altered by

ern Railroad Co. v. Nemitz, 404 U.S. 37, 92 S.Ct. 185, 30 L.Ed.2d 198 (1971). Nevertheless, UTU argues that it is still free to strike MOPAC over its refusal to negotiate about the selection of forces for KATY trains operating on MOPAC lines.

The authority of the ICC in consolidation and trackage rights proceedings is plenary and exclusive. 49 U.S.C. § 11341(a); *Chicago & North Western Railway Co.*, 314 F.2d at 431. In *Chicago & North Western Railway Co.*, the Eighth Circuit held that this power includes jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers. *Id.* There the union argued that it had a right to strike over five jobs which were being eliminated, and other seniority problems, pursuant to an ICC-approved merger. The issue in that case was whether disputes arising from the merger must be resolved according to the procedures of the RLA or the arbitration provisions of the ICC order approving the consolidation in question. In affirming the district court's ruling that the ICC order controlled and that the RLA procedures were inapplicable, the Court of Appeals extensively discussed the relationship between the jurisdiction of the ICC over consolidations and the rights of employees affected thereby. *Id.* at 427-33.

The *Chicago & North Western Railway Co.* Court held that the ICC has the right to make provisions, in approving consolidations, that conflict with existing collective bargaining agreements and RLA procedures. *Id.* at 427. The Court found the "major"/"minor" analysis inapplicable because the RLA had been exempted by the ICC. *Id.* at 429. Accordingly, the ICC had the power to authorize changes in working conditions and to resolve

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the carrier and the employee representative. Moreover, the use of the term "may" in the provision relied upon by UTU suggests that it is permissive rather than mandatory. Therefore, MOPAC does not have any *duty* to negotiate with UTU under that provision.

conflicting seniority rights free from the constraints of the RLA. *Id.*

Moreover, the Court found support for its conclusion in the legislative history of the ICA. The Court pointed out that the Harrington amendment to the ICA, which would have brought about a freeze of existing employees in their job rights and thereby would have threatened to prevent all consolidations, *id.* at 430, was defeated. The Court concluded that Congress intended the jurisdiction of the ICC to displace RLA procedures in merger-related disputes:

> Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations.

Id. at 431. Several years later the Eighth Circuit read *Chicago & North Western Railway Co.* as holding that "the employees did not have a right to strike over merger-related disputes." *General Committee of Adjustment v. Burlington Northern, Inc.*, 563 F.2d 1279, 1285 (8th Cir. 1977).

UTU relies heavily[9] upon *Texas & New Orleans Railroad Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d

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[9] UTU also relies upon *Order of Railroad Telegraphers v. Chicago & North Western Railway Co.*, 362 U.S. 330, 80 S.Ct. 761, 4 L.Ed.2d 774 (1960). However, this Court finds *Order of Railroad Telegraphers* to be inapposite. There, the Court held that the NLGA prevented the district court from enjoining a strike by the Order of Railroad Telegraphers. The Order of Railroad Telegraphers sought to force the carrier to negotiate an amendment to the contract to prevent the dismissal of any employees as a result of the carrier's consolidation of several stations. The case is not apposite, however, because the ICC was not involved and had not issued any final orders governing the consolidation. Indeed, the carrier was

151 (5th Cir. 1962). In that case the carrier had given the union notice, under RLA § 156, of an intended change in operation. The carrier had also applied for and received approval from the ICC to carry out the change, which approval imposed certain employee protective conditions. However, the union threatened to strike after the carrier put the approved changes into effect and the carrier then brought suit to enjoin the strike. The Court affirmed the district court's denial of an injunction and rejected all arguments that the NLGA was displaced by the provisions of the ICA.

First, the *Texas & New Orleans Railway Co.* Court rejected the argument that the exemption power of the ICC exempted the NLGA. The Court held:

> This section [11341(a)] relieves the carriers of the restraints and limitations of other laws, but it does not, on its face, relieve them from the action of other parties, i.e., the union's economic threat of a strike. Further, Norris-LaGuardia could not be considered as a legal restraint or limitation on the carriers and their ability to carry out an approved transaction. It is directed not at the power of the carriers to do anything but to the power of the court to grant injunctive relief.

307 F.2d at 156. Second, the Court rejected the argument that the ICC's power to impose employee protective conditions under § 11347 of the ICA should be treated as an exception to the NLGA. The Court viewed such conditions as an imposition of duties on the carrier only and not as a prohibition against the union "from gaining further rights in the transaction through the use of its own economic power—the strike." 307 F.2d at 157. Finally, the Court rejected the argument that the NLGA must give way to the authority of the ICC to approve transactions. *Id.* at 159.

seeking approval from several state agencies. The Court stated: "Nothing the union requested would require the railroad to violate any valid law or the valid order of any public agency." *Id.* at 340, 80 S.Ct. at 767. Here, on the other hand, MOPAC would be violating a material term of the ICC's approval of the trackage rights agreement if it took any action to require the use of MOPAC employees on KATY trains operating its trackage rights.

This Court disagrees with the result reached in *Texas & New Orleans Railway Co.* Although *Chicago & North Western Railway Co.* is not on point,[10] it is the opinion of this Court that the underlying concern in *Chicago & North Western Railway Co.* warrants rejection of *Texas & New Orleans Railway Co.* In the *Chicago & North Western Railway Co.* case, the Court was concerned with the consequence of narrowly restricting the scope of the ICC's power—labor unions could effectively block many or all consolidations which are approved by the ICC. The Harrington amendment was rejected to avoid such a consequence and, therefore, the Court interpreted the ICC's jurisdiction broadly to displace the applicability of the RLA. Similarly, it is the opinion of this Court that the applicability of the NLGA must be displaced by the power of the ICC over transactions like the one here, in order to avoid consequences which Congress intended to prevent.

The Supreme Court has stated that it will constrict the NLGA's broad prohibitions "in narrowly defined situations where accommodation of that Act to specific congressional policy is necessary." *Jacksonville Bulk Terminals v. Longshoremen*, 457 U.S. 702, 726, 102 S.Ct. 2673, 2685, 73 L.Ed.2d 327 (1982). Congress gave the ICC

[10] There are two (2) problems with applying *Chicago & North Western Railway Co.* to this case. First, UTU's dispute is not covered by any of the arbitration provisions imposed by the ICC. *See N & W Conditions* Article 1, §§ 4, 11. *See also Finding of Fact No. 8.* Second, that case did not deal with the NLGA question. *Chicago & North Western Railway Co.* was a declaratory judgment action, rather than an action to obtain injunctive relief from a threatened strike. *See also Chicago & North Western Railway Co.*, 314 F.2d at 433.

exclusive and plenary authority to approve certain transactions which are in the public interest. In so doing, Congress specifically intended the ICC to authoritatively resolve labor disputes arising from rail consolidations "in order that economically desirable mergers not be obstructed." *International Assn. of Machinists and Aerospace Workers v. Northeast Airlines, Inc.*, 473 F.2d 549, 559 n.15 (1st Cir. 1972). The legislative history of the ICA evidences this intent. *Id.* Moreover, as the ICC stated in its October 19, 1983, decision:

> If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, *our jurisdiction to approve transactions requiring changes of the working conditions of any employee would be substantially nullified.* Such a result would be clearly contrary to congressional intent.

F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) (emphasis added). *See Finding of Fact No. 23.*

In the case at bar the ICC authoritatively resolved the question of which employees may operate KATY's trains over MOPAC lines. The NLGA must be accommodated to this exercise of the ICC's power, because allowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

Although it is not for this Court to question the wisdom of Congress' action, in this case it is not difficult to see why Congress intended the NLGA to be inapplicable to ICC-resolved, consolidation-related labor disputes. In the case at bar, UTU and other labor representatives participated in the ICC proceedings. *See Finding of Fact No. 6.* UTU does not contend that it did not have

adequate opportunities to object to any provision of the transaction, including the trackage rights agreement, or to seek favorable treatment. UTU either failed to object to the crewing provisions of KATY's trackage rights application or it did object and the ICC rejected its objection.[11] In either case, it is inconceivable that Congress intended that a labor union would be able to participate in ICC approval proceedings and then, if the union was dissatisfied with the result or a part thereof, strike a carrier to obtain the advantage it desired.

Moreover, it is not probable that Congress intended to allow UTU to strike where UTU's objective is to obtain an advantage which MOPAC is now unable to give—the right to operate KATY trains that run over MOPAC lines. If MOPAC gave that right to any of its employees, MOPAC would breach its agreement with KATY and would vary a material term of an agreement approved by the ICC. If UTU obtained its objective by striking, wouldn't KATY employees then be free to strike to obtain the same advantage? To avoid the stifling effects that such economic power would have on any attempt to consolidate railroad operations, Congress vested the ICC with the authority to resolve such disputes during approval proceedings. Affected employees are not left out in the cold, because § 11347 requires the ICC to impose employee protective conditions. 49 U.S.C. § 11347. The balance and efficiency which Congress sought to achieve with this scheme would be essentially and materially frustrated if employees were free to strike.

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[11] Here, according to the ICC, UTU did not specifically object to the crewing provisions of the trackage rights agreement at any time during the approval proceedings. F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 8-12. *See Finding of Fact No. 23. See also supra*, note 4. UTU disputes this finding, but it matters not because the question of whether UTU objected to the crewing provisions of the trackage rights agreement is not material to this Court's resolution of the NLGA problem.

The Court is aware that *dicta* in various Supreme Court decisions indicates that exceptions to the prohibitions of the NLGA will be found only where necessary to accommodate other Congressional objectives embodied in so-called "labor legislation". *Chicago River*, 353 U.S. at 42, 77 S.Ct. at 641. The ICA was not enacted "as a part of a pattern of labor legislation," *id.*, but because the ICC has jurisdiction over labor disputes in connection with consolidation proceedings, excepting the NLGA in the case at bar does not result in a great departure from established doctrine. Indeed, the following passage from *Chicago River* can be read as supporting the result reached by this Court:

> We hold that *the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes.* There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.

353 U.S. at 40, 77 S.Ct. at 640 (emphasis added). Here, the NLGA must be accommodated to the ICA in order to preserve the obvious purpose of giving the ICC jurisdiction over railroad consolidation proceedings.

c. MOPAC HAS NOT VIOLATED SECTION 108 OF THE NORRIS-LaGUARDIA ACT

One final argument of UTU is that even if § 104 of the NLGA is inapplicable here, injunctive relief is still not appropriate because MOPAC violated § 108 of the NLGA. UTU contends that MOPAC violated § 108 by failing to negotiate with UTU or submitting this dispute to the National Mediation Board or to voluntary arbitration. *See generally, Brotherhood of Railroad Trainmen, Enterprise Lodge No. 27 v. Toledo, Peoria & Western Railroad*, 321 U.S. 50, 64 S.Ct. 413, 88 L.Ed. 534 (1944).

UTU's argument must be rejected, however, because § 108 requires a complainant to "make every *reasonable*

effort to settle" the dispute. 29 U.S.C. § 108 (emphasis added). In the case at bar the ICC conclusively determined that KATY may use its own employees on its own trains over MOPAC lines. Because the ICC conclusively determined the dispute in the case at bar, it would not be reasonable for MOPAC to negotiate, mediate or arbitrate with the UTU concerning the selection of forces to operate the trackage rights.

d. SUMMARY

In sum, this Court holds that the anti-injunction provisions of the NLGA do not deprive this Court of jurisdiction to enjoin UTU's threatened strike. Two (2) alternative rationales support this holding: first, this is a "minor" dispute within the meaning of the RLA; and second, even if this is "major" dispute within the meaning of the RLA, § 104 of the NLGA is displaced to preserve the purposes and objectives of the ICC's jurisdiction over labor disputes in consolidation proceedings. In addition, this Court holds that MOPAC did not violate § 108 of the NLGA.

3. PRELIMINARY INJUNCTION CRITERIA

In *Dataphase Systems, Inc. v. C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), the Court identified the following four (4) factors which must be considered by a district court in passing on a motion for a preliminary injunction:

> (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.

Id. at 114. These four (4) criteria weigh in favor of granting preliminary injunctive relief against defendants' threatened strike.

First, it is clear that a strike by UTU against MOPAC is very likely to result in irreparable harm to MOPAC. *Finding of Fact No. 24.* UTU does not even attempt to contest this factor in its opposition to the motion.

On the second element, the balance between the threat of irreparable harm and the harm that will be inflicted on defendants if a preliminary injunction is granted, MOPAC suggests that the harm to UTU will be modest in view of two facts: 1) UTU has consented to a continuance of the temporary restraining order several times; and 2) the N & W Conditions provide UTU employees with adequate protection from the adverse effects of KATY employees operating the trackage rights. *See Findings of Fact Nos. 15, 8.* This Court agrees. The protective conditions provide adversely affected employees with displacement allowances, dismissal allowances and fringe benefits. Moreover, the trackage rights have been operated by KATY with KATY employees for over a year now. Any harm on UTU members has most likely already occurred. Any additional harm that might be caused by enjoining the threatened strike will not be irreparable.

The third factor, probability of success on the merits, is not a problem here. This Memorandum resolves UTU's primary defense, that this Court lacks jurisdiction to enjoin UTU's threatened strike, in favor of the carriers. *See supra.* Moreover, this Memorandum grants plaintiffs' motion for summary judgment on defendants' counterclaim, *see infra.* Therefore, success on the merits is likely.

Finally, the public interest in uninterrupted freight shipment weighs in favor of granting the motion. *See Finding of Fact No. 24.*

Accordingly, plaintiffs' motion for a preliminary injunction is granted.

II MOTION TO REFER ISSUES TO INTERSTATE COMMERCE COMMISSION

Prior to the October 19, 1983, decision of the ICC, *see Finding of Fact No. 23,* UTU moved to refer two (2) issues to the ICC pursuant to 28 U.S.C. § 1336(b) and the doctrine of primary jurisdiction. *See United States v. Western Pacific Railroad Co.,* 352 U.S. 59, 63-65, 77 S.Ct. 161, 164-66, 1 L.Ed.2d 126 (1956); *Iowa Beef Processors, Inc. v. Illinois Central Gulf Railroad Co.,* 685 F.2d 255 (8th Cir. 1982). UTU phrased these two (2) issues, as follows:

> 1. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific Western Pacific,* 366 I.C.C. 462 (1982), intend to exempt under 49 U.S.C. § 11341(a) the carriers involved in that transaction from the requirements of the Railway Labor Act, 45 U.S.C. § 151 *et seq.,* that they negotiate with rail labor those changes in rules and working conditions which may be required to implement the ICC's permissive authority?
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> 2. Did the ICC by its order in *Union Pacific—Control—Missouri Pacific Western Pacific,* 366 I.C.C. 462 (1982), require the Missouri Pacific Railroad (MoPac) and the Missouri-Kansas-Texas Railroad (MKT) both to give advance notice to all MoPac and MKT employees who might be affected by the implementation of the Trackage Rights granted in Finance Docket No. 30,000 (Sub-No. 25) and, if requested, to negotiate an implementing agreement with those employees?

Motion of Defendants To Refer Issue To The Interstate Commerce Commission at 1-2. Following the ICC's October 19, 1983, decision UTU admits that its motion to refer is moot as to issue #1. However, it contends that its motion is not moot as to issue #2. Plaintiffs argue that the ICC's recent decisions also mooted the motion as to issue #2.

Essentially, this Court must decide whether the ICC's orders determined issue #2. UTU contends that the ICC's most recent order did not address the impact of Article 1, § 4 of the N & W Conditions, *see Finding of Fact No. 8*, and the right of UTU to require MOPAC to negotiate an implementing agreement with respect to the selection of forces problem. However, it is the opinion of this Court that the ICC's most recent decision makes it clear that the Article 1, § 4 requirement of notice and negotiation is inapplicable with respect to the selection of forces issue.

In its October 19, 1983, decision the ICC noted defendants' "notice and negotiation" argument, but rejected it. *See Findings of Fact Nos. 22, 23.* Moreover, the ICC held that UTU has *no* right to participate in the crew selection process and that MOPAC/KATY could implement their trackage rights agreement without *any* other approval. *Finding of Fact No. 23.* Finally, the ICC's discussion concerning the interpretation of labor conditions imposed in connection with an approved transaction, further suggests that Article 1, § 4 is not applicable to the crew selection issue:

> [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

F.D. No. 30,000 (Sub-No. 18) *et al.*, (October 19, 1983) at 6. Read in the context of the ICC's approval of the

crew selection provisions of the trackage rights agreements, Article 1, § 4 is not applicable to that issue.[12] *See also Brotherhood of Maintenance of Way Employees v. Interstate Commerce Commission*, 698 F.2d 315, 317 n.6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration.")

Arguably, a portion of issue #2 was not decided by the ICC. The issue phrased by UTU is broad enough to cover the question of whether plaintiffs have any duty under Article 1, § 4 to give notice and negotiate an implementing agreement with respect to *issues other than the selection of forces. See Finding of Fact No. 17.* There is no need to refer this question to the ICC, however, because there does not seem to be any ambiguity about this question in the ICC's orders and because the central dispute between the parties, as evidenced by the positions of the parties taken in their memoranda, concerns the narrower question of plaintiffs' duty to negotiate about selection of forces.

Accordingly, UTU's motion is denied.

III CROSS-MOTIONS FOR SUMMARY JUDGMENT ON PLAINTIFFS' COMPLAINT

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if he

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[12] Thus, as to plaintiffs' trackage rights agreement, the effect of the ICC's orders is that the following sentence is inapplicable:

> Each transaction which will result in a dismissal or displacement of employees or rearrangement of forces, shall provide for *the selection of forces* from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

N & W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

can "show that there is no genuine issue as to any material fact and that [he] is entitled to a judgment as a matter of law." *Fed. R. Civ. P.* 56(c). *See also Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). In passing on a motion for summary judgment, a court is required to view the facts and inferences that may be derived therefrom in the light most favorable to the non-moving party. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983); *Vette Co. v. Aetna Casualty and Surety Co.*, 612 F.2d 1076, 1077 (8th Cir. 1980). The burden of proof is on the moving party and a court should not grant a summary judgment motion unless it is convinced that there is no evidence to sustain a recovery under any circumstances. *Buller*, 706 F.2d at 846. However, under Rule 56(e), a party opposing a motion for summary judgment may not rest upon the allegations of his pleadings but "must set forth specific facts showing that there is a genuine issue for trial." *Fed. R. Civ. P.* 56(e). *See also* 10A Wright, Miller and Kane, *Federal Practice and Procedure: Civil 2d*, § 2739 (1983).

Plaintiffs moved for summary judgment on their complaint. Defendants filed a cross-motion for summary judgment. Plaintiffs argue that this is a "minor" dispute, that plaintiffs are exempt from the requirements of the RLA, and that this Court has jurisdiction to enjoin defendants' threatened strike. Defendants argue that this is a "major" dispute, that plaintiffs violated the RLA, and that sections 104 and 108 of the NLGA bar this Court from enjoining the strike.

It is obvious that this Memorandum determines several of the legal issues raised by the cross-motions for summary judgment. Moreover, neither party suggested that there are any genuine issues of material fact with respect to plaintiffs' complaint. Nevertheless, the summary judgment motions relating to plaintiffs' complaint will not be ruled upon at this time for the following reasons.

The parties, in their memoranda, utilize the "shotgun" method of argument. Accordingly, this Court found it difficult to answer each of the parties' contentions in a systematic and orderly fashion. The positions of the parties, especially UTU, seem to change with each response or reply to the prior memorandum. Moreover, the record in this case is remarkably inadequate and incomplete. In several instances the parties rely on documents that are not even in the file! This is not an adequate basis upon which to enter summary judgment on a claim for permanent injunctive relief.

The rulings of this Court on the legal questions related to the NLGA are not subject to further argument. Rather than rule on the parties' cross-motions for summary judgment at this time, however, it is the opinion of this Court that the parties should reevaluate their summary judgment positions in light of this Memorandum. The parties are also ordered to meet and confer for the purpose of: 1) attempting to settle this dispute or come to an understanding as to what, if any, legal or factual issues remain undetermined; 2) stipulating to as many undisputed and necessary facts as possible; 3) organizing the complete documentary record in this case into a presentable form; and 4) determining whether any oral testimony will be necessary on any remaining issue, including the question of whether the preliminary injunction issued herein should be made permanent. The parties shall meet and accomplish these purposes within ten (10) days of the date of this Memorandum. The parties shall appear before this Court on Friday, March 16, 1984, at 10:00 a.m., to report on the results of their efforts. The trial of this case is reset for March 26, 1984.

IV PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS

Plaintiffs' motion for summary judgment on defendants' counterclaim presents a different situation. It can be determined solely by reference to the ICC's orders in

this case and the arguments of the parties are more clear.

Count I of defendants' counterclaim alleges that MOPAC violated § 156 of the RLA by unilaterally changing the objective working conditions of its employees without following the procedures of § 156. This Court agrees with plaintiff, as discussed *supra*, that the ICC's actions exempt MOPAC from the requirements of the RLA. 49 U.S.C. § 11341(a). Accordingly, plaintiffs' motion is granted as to Count I of defendants' counterclaim and said count is dismissed.

Count II of defendants' counterclaim alleges that both MOPAC and KATY violated the orders of the ICC by failing to comply with the N & W Conditions, specifically Article 1, §§ 2 and 4, in connection with the use of KATY employees to operate the trackage rights. Again, as discussed *supra*, this Court agrees with plaintiffs that the ICC orders in question make it very clear that those sections of the N & W Conditions were not intended to apply to the crew selection provisions of the trackage rights agreements. To the extent UTU takes issue with the actions of the ICC, this is not the proper forum for resolution of that issue. 28 U.S.C. §§ 2321(a), 2342. Accordingly, plaintiffs' motion is granted as to Count II of defendants' counterclaim to the extent that that count seeks to force plaintiffs to negotiate the selection of forces to perform the trackage rights authorized by the ICC.

However, Count II of defendants' counterclaim can be read as requesting this Court to order plaintiffs to comply with N & W Conditions, Article 1, § 4, with respect to *issues other than crew selection*. For example, there is no indication that the ICC made the first sentence of the second paragraph of Article 1, § 4, inapplicable to this transaction.[13] *Cf. supra*, note 12. It is clear that plaintiffs

[13] The first sentence of the second paragraph of Article 1, § 4, provides:

> At the request of either railroad or representatives of such interested employees, negotiations for the purpose of reaching agreement with respect to *application of the terms of conditions* of [these N & W Conditions] shall commence immediately and continue for not more than twenty (20) days from the date of notice.

N & W Conditions, Article 1, § 4 (emphasis added). *See Findings of Fact Nos. 8, 17.*

did not give the twenty (20) days notice required by Article 1, § 4. *See Findings of Fact No. 17.* It is also clear that KATY complied with Article 1, § 4 with respect to its own employees. *See Findings of Fact No. 21.* But the extent to which MOPAC so complied, with respect to its own employees, is not clear on this record. This may present a question of fact and, therefore, plaintiffs' motion is denied as to this aspect of Count II of defendants' counterclaim. The parties' conferences, pursuant to Part III of this Memorandum, shall address Count II of defendants' counterclaim.

ADDENDUM B

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30532

MAINE CENTRAL RAILROAD COMPANY,
GEORGIA PACIFIC CORPORATION, CANADIAN PACIFIC LTD.
AND SPRINGFIELD TERMINAL RAILWAY COMPANY—
EXEMPTION FROM 49 U.S.C. 11342 and 11343

Decided: August 22, 1985

[Served September 13, 1985]

By petition filed April 10, 1985, the United Transportation Union (UTU) seeks reconsideration of our decision served March 20, 1985. That decision granted the petition of Maine Central Railroad Company (MEC), Georgia Pacific Corporation (GP), Canadian Pacific Ltd. (CP), and Springfield Terminal Railway Company (ST) for exemption under 49 U.S.C. 10505 from the provisions of 49 U.S.C. 11342 and 11343(a)(2). MEC replied to the petition. We affirm our prior decision.

Under the exempted transactions, MEC will lease to GP four specific lines of railroad near Woodland, ME. GP has contracted with ST to operate and maintain the lines. ST will act as the switching carrier at Woodland and CP will be the initial line haul carrier for GP's Woodland traffic moving beyond Calais, ME. GP may route its traffic for the account of either MEC or CP, but MEC and CP have agreed that CP will interline all of the Woodland traffic at Milltown Junction and haul it

over a northwestern route. Thus GP's Woodland traffic will no longer move southwest over MEC's Calais Branch, but MEC and CP will continue to compete for GP's traffic.

In granting the leasing and pooling exemptions, the Commission found that regulation was not necessary to carry out the rail transportation policy because, *inter alia*, implementation would result in more responsive transportation of Woodland traffic and more efficient rail operations. The transaction was found to be of limited scope because the lease and operation involved only approximately 12 miles of track and the pooling of a single shipper's traffic. The Commission found that there would be no abuse of market power because of alternative truck transportation available to shippers on the Calais Branch, and noted that no shippers opposed the petition.

UTU urges reconsideration and revocation of the exemption because the corporate entities are involved in a "shell game" to enable Guilford Transportation Industries, Inc. (GTI)[1] to lower its operating costs by reducing employee obligations. UTU states that the wages of ST employees are lower than those of MEC employees, and the ST labor agreements are less restrictive than agreements involving MEC employees. Furthermore, the transaction would enable GP, the largest shipper, to have its traffic handled by ST and eventually MEC operations over the Calais Branch would be abandoned.

UTU also believes that the Commission erred in imposing only the conditions for the protection of railway employees in *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980) (*Mendocino*). These conditions were imposed on the section 11343 transactions, but not in connection with the pooling arrangement.

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[1] MEC is a wholly owned subsidiary of GTI. ST is a subsidiary of Boston & Maine Corporation, another wholly-owned subsidiary of GTI.

UTU argues that this is an unusual transaction requiring imposition of the conditions in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock*) on all transactions approved in this proceeding. It claims that the transactions are unusual because of severe employment disruption and diversion of traffic from the line.

UTU states further that MEC is a party to the Washington Job Protection Agreement (WJPA), which requires carriers to give advance notice and negotiate the selection of forces when they unify, pool or consolidate their previously separate facilities or operations. Imposing *Mendocino*, UTU argues, authorizes the carriers to deny employees their statutory and contractual WJPA notice and negotiation rights. UTU states that the *New York Dock* conditions would restore employees' notice and negotiation rights.

MEC argues that reconsideration and revocation are not appropriate, because UTU has not shown that regulation is required to carry out the rail transportation policy, 49 U.S.C. 10101a as required by 49 U.S.C. 10505(d), or that the Commission erred in its findings concerning limited scope and market power. MEC argues that even if the purpose of the transaction was to lower GTI's operating costs, this is a proper purpose, because one of the principal goals of the Staggers Rail Act of 1980 (Staggers Act) was to encourage railroads to earn adequate revenues. MEC contends however, that the main reason for the transaction was to satisfy the shipper, GP.

MEC states further that abandonment of the Calais Branch is a matter distinct from the transactions at Woodland. MEC has neither abandoned nor filed to abandon the Calais Branch.

MEC agrees that there is a difference in preconsummation requirements between *Mendocino* and WJPA and *New York Dock*. It states that the appropriateness of the *Mendocino* conditions for lease transactions has been upheld in court. *Railway Labor Executives Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982) *RLEA*. MEC further disputes UTU's characterization of the transaction as an unusual one requiring greater protection than the *Mendocino* conditions. As indicated in UTU's own statement, only 5 employees will be affected.

Finally, MEC argues that UTU has not shown that *Mendocino* results in the impairment of any collective bargaining agreement. Citing UTU's own statement, MEC states that *Mendocino* itself requires the preservation of all rights under these agreements.

DISCUSSION AND CONCLUSIONS

There are two issues that are raised in this appeal that we need to resolve: (i) whether it was proper to grant the exemption and impose the *Mendocino* conditions; and (ii) the effect that our imposition of employee protective conditions has on other rail labor agreements and laws.

We determined, in our prior decision, that regulation was not necessary to carry out the rail transportation policy, that the transaction was of limited scope, and that there was no potential for the abuse of market power. While UTU has not specifically directed its appeal to any one of these findings, the appeal appears to bear most directly on the rail policy finding.

UTU is concerned that this transaction may adversely affect traffic over the Calais Branch and eventually cause that line to be abandoned. There is no evidence of harm to the Calais Branch, nor is there a pending abandonment application. In addition, if MEC wanted to abandon this line, it would first have to comply with 49 U.S.C. 10903-10906, and need approval from this agency. Further, it is appropriate for a railroad to take steps to reduce its operating costs by directing traffic over a more efficient, less costly route. Reducing costs complies with rail transportation policy by fostering sound economic conditions in transportation [49 U.S.C. 10101a(5)] and encouraging efficient management [49 U.S.C. 10101a(10)].

In addition, the rail transportation policy does not require a carrier to route traffic over a particular line to prevent abandonment or to maintain jobs. Rather than contravening the rail transportation policy, this exemption promotes its goals by minimizing the need for Federal regulatory control over the rail system, expediting regulatory decisions, and reducing barriers to entry, in addition to those previously noted. Rail transportation policy does require that operating economics and efficiencies not be accomplished solely at the expense of rail labor. However, that objective will be met by our imposition of labor protective conditions if, as labor fears, MEC applies for authority to abandon the Calais Branch at some future date.

UTU's petition does not challenge the limited scope or lack of market power findings. We therefore affirm our prior finding that exemption is warranted here.

We also affirm the imposition of the *Mendocino* conditions for protection of employees affected by this lease transaction. Under 49 U.S.C. 10505(g)(2), the Commission may not exercise its authority under section 10505 to relieve a carrier of its obligation to protect the interests of employees as required by 49 U.S.C. Subtitle IV. In this case, where the leasing by one carrier of another carrier's property was exempted from the requirements of 49 U.S.C. 11343(a)(2), *et seq.*, labor protection is required by 49 U.S.C. 11347.[2] It is well settled that the *Mendocino* conditions are appropriate for lease transactions. See *RLEA*, *supra*, affirming the Commission's decision in *Mendocino*.

In RLEA, the Court of Appeals for the District of Columbia Circuit was called upon to determine the effect on

[2] We are not required by statute to impose labor protective conditions on pooling arrangements, and, as previously found, the record does not demonstrate a need for imposition here. Section 11347 mandates labor protection on transactions approved under sections 11344 (referring to the transactions under 11343), 11345 and 11346. Pooling is governed by section 11342.

transactions involving leases and trackage rights of Section 11347 (enacted in the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act)). To the extent pertinent here, section 11347 requires that, in transactions approved under sections 11344-46 (see n. 2, *supra*), the Commission impose employee protective conditions "at least as protective of the interests of employees as the terms imposed [before the 4R Act]." The critical question thus becomes the nature of the protective conditions approved by the Commission before 1976 in trackage rights and lease cases.[3]

The court reviewed the history of job protective arrangements, commencing with the 1936 WJPA (675 F.2d at 1250-51), and found that the Commission had customarily imposed conditions in lease and trackage cases that differed from those imposed in mergers and consolidations. 675 F.2d at 1251. The principal differences were the absence of the 90-day notice and the implementing agreement requirement (sections 4 and 5 of WJPA, n. 3 *supra*) in the conditions imposed in lease and trackage rights case (*id.*).[4] The court found that Congress did not intend "to alter well-established Commission practice with the requirement that the Commission impose

[3] We have previously determined the appropriate level of labor protection for mergers and consolidations in *New York Dock*, *supra*. Those conditions are sought by UTU here. The protections under *New York Dock* and *Mendocino* are for the most part identical. The principal difference is that *Mendocino* does not contain the equivalent of section 4 of the WJPA (requiring 90 days notice prior to a coordination—*Mendocino* requires 20 days notice) or section 5 of WPJA (no coordination could be effective until carrier and employees had reached an implementing agreement). *RLEA*, 675 F.2d at 1250.

[4] The court's factual finding as to the level of protection in pre-1976 lease cases relied in part on the Commission's decision but also on data gathered by the petitioning labor unions which supported the Commission's version of relevant labor history. 675 F.2d at 1251, n. 7.

the [*New York Dock*-type] conditions in trackage rights cases." (675 F.2d at 1254-56). Accordingly, the Commission's *Mendocino* decision, "reflect[ing] an accurate interpretation of the 1976 amendment" (675 F.2d at 1256) was affirmed.

The court recognized that the protection it was approving represented the minimum protection required by Section 11347 and particular lease transactions "may threaten impacts requiring additional protection" (*id.*). The court noted that this was also Commission's position, quoting *Mendocino* (360 I.C.C. at 633): "this does not preclude the consideration in particular cases of greater levels of protection . . . where the need therefore has been specifically established" (675 F.2d at 1256, n. 19). The court went on to "entrust to the Commission" the task of determining when more protection may be needed (675 F.2d at 1256).

UTU contends that greater protection than that normally provided in lease transactions is needed here. But it fails to demonstrate that there are any new or special factors present here requiring a higher level of protection. In fact, this case comes within each of the reasons given by the Commission in the *Mendocino* decision for reduced level of protection in lease transactions (i.e., not requiring in such transactions "substantially advanced preconsummation notice and finalized preconsummation negotiations") (360 I.C.C. at 663). The Commission found "little justification" for these protections where "there are no substantial number of employees likely to be adversely affected by a trackage rights or lease transaction." *Id.* There are only five employees involved here. The Commission continued, "Typically, most of these transactions are not opposed by carriers or members of the shipping public . . ." *Id.* There is neither carrier nor shipper opposition in this case.[5] These

[5] We also observed that the delay of service improvements until labor negotiations on potentially unrelated matters were concluded would not be in the public interest (360 I.C.C. at 663).

statements confirm our view that the *Mendocino* conditions are appropriate here.

UTU contends that the provisions of WJPA should apply because MEC was a signatory of that agreement. UTU's position is inconsistent with *RLEA* and the history of labor protection under the Interstate Commerce Act since at least 1970 and arguably much earlier. As we have described, the *RLEA* court affirmed a Commission determination that the appropriate labor conditions in trackage rights and lease transactions need not include the protections afforded by Sections 4 and 5 of WJPA.[6] Not only did the court determine that the carriers were not bound by WJPA in those transactions, WJPA was not even considered to be material to the determination of appropriate conditions, other than as a significant historical event.[7]

We would be impermissibly overruling *RLEA* and our prior decisions if we were to now impose WJPA sections 4 and 5 on all lease and trackage rights cases involving signatories of WJPA—in effect, the vast majority of such transactions. Such a result would also be inconsistent with the extended pre-1976 labor history relied upon by us in *Mendocino* and the court in *RLEA*. That history showed a consistent Commission policy (accepted by labor) of not giving WJPA section 4 & 5 protection in trackage rights and lease transactions.[8] The absence

[6] The railroads involved in *RLEA*, Baltimore and Ohio Railroad Company and Burlington Northern, Inc., were signatories (through predecessors in the latter case) of WJPA.

[7] WJPA was referred to as a "blueprint for all subsequent job protection agreements" by the court that upheld the Commission's determination of the appropriate protective conditions for mergers. *New York Dock Railway* v. *United States*, 609 F.2d 83, 86 (2d Cir. 1979). Nonetheless, that court did not rely on WJPA in deciding the level of protection. That determination was based on prior Commission action (609 F.2d at 94), as in *RLEA*.

[8] In *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68, (D.C.C. 1971), labor lost an argument that the full protection of WJPA sections 4 and 5 had to be included in the Amtrak protective

of any separate enforceable validity of the WJPA conditions has thus been an accepted aspect of labor relations under the Interstate Commerce Act for a substantial period of time.[9]

Neither the Commission nor the courts have been called upon to articulate the reasons for the disappearance of any separate statute for WJPA.[10]

It may be that, as stated in *Southern*, "the terms of the Washington Agreement were in substance and almost in their entirety among the conditions imposed," 331 I.C.C. at 169. It may be due to the success of labor with Congress and the Commission in achieving a standard required level of conditions that, in the words of the Second Circuit in 1979, "can be fairly characterized as significantly more protective of the interests of railway labor than any previously imposed set employee protective conditions." 609 F.2d at 91. Whatever the reason, it is clear that all concerned parties, labor, management and the Commission, have operated under the assump-

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conditions. 326 F. Supp. at 75-76. See *RLEA*, 675 F.2d at 1256, n. 18.

[9] An early Commission case cited by UTU speaks of the "independent nature of rights" given by WJPA. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 169 (1967). First, we were there talking of the preemptive power of Section 5(11) (now Section 11341), not an issue here. Second, the substance of the WJPA was incorporated in the conditions imposed (the so-called *New Orleans* conditions). Finally, the suggestion that WJPA had an independent stature requiring greater than normal protection was not reflected in the future course of labor history and will not be followed today.

[10] A potential reason for the courts' and the Commission's consistent refusal to impose the higher standard of WJPA to lease and trackage rights transactions is the questionable applicability of WJPA to such transactions. WJPA only applies to "coordinations," a term defined in section 2(a) of WJPA as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or part in their separate facilities . . ."

tion that WJPA was subsumed into or replaced by the labor protective conditions imposed in Commission decisions. The 1976 4R Act (legislation that benefited from plentiful advice from each of these concerned parties) simply reflected the existing state of Commission labor law—that employee organizations sought and received the full measure of their protection from the effects of a Commission approved transaction in Commission proceedings. WJPA, while perhaps relevant as evidence of past practice, was not an independent source of any enforceable protect[ion.]

It is manifest that Congress in 1976 intended the protection afforded labor to be limited by the conditions imposed in the pertinent Commission proceeding. The conditions imposed by the Commission today may contain all or only some of the WJPA conditions (as here), but the imposed conditions are not invalid as including less than all. Therefore, UTU's objection on this ground is without merit.

We should note that similar arguments could be made on the basis of the Railway Labor Act (RLA). A union may contend, for example, that labor is entitled to the 30-day notice provisions of Section 6 of that Act. 5 U.S.C. 156. We believe this would fall in the same category as the WJPA contentions, discussed above. The provisions of RLA are reflected and subsumed in the conditions imposed by the Commission. It is apparent that such has been the assumption of Congress and all the interested parties.

In *Southern Control*, the Commission observed that section 6 of RLA "would seriously impede mergers," if it were not for the protections of WJPA that were essentially incorporated in the Commission's decision. 331 I.C.C. at 171. RLA thus had no independent effect. *Southern Control* was the Commission's response to a Supreme Court directive in *Railway Labor Executives' Association* v. *U.S.*, 379 U.S. 199 (1964), that the Com-

mission clarify the scope of protective conditions imposed in a certain merger. It may be noted that the Court's concern was not with the provisions of RLA or WJPA (except as reflected in the Commission's order), but with the level of employee protection decreed by the Commission in its order. It is that order, not RLA or WJPA, that is to govern employee-management relations in connection with the approved transaction.

Such a result is essential if transactions approved by us are not to be subjected to the risk of nonconsummation as a result of the inability of the parties to agree on new collective bargaining agreements effecting changes in working conditions necessary to implement those transactions. All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. See *REA Express, Inc.* v. *B.R.A.C.*, 459 F.2d 226, 230 (5th Cir. 1972). Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected. Such a result we believe is unaccaptable and inconsistent with section 11341 of our act and with section 7 of the RLA which provides that arbitration awards thereunder may not diminish or extinguish any of our powers under the Interstate Commerce Act.[11]

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[11] For the same reason we reject the argument that the provision of our conditions requiring that working conditions not be changed except pursuant to renegotiated collective bargaining agreements reinvigorates the RLA and causes its provisions to supercede the mechanism for resolving disputes associated with negotiating implementing agreements contained in the labor protective conditions we impose on approved transactions.

It is ordered:

1. The petition of UTU for revocation and reconsideration is denied.

2. This decision is effective on the date of service.

By the Commission, Chairman Taylor, Vice Chairman Gradison, Commissioners Sterrett, Andre, Simmons, Lamboly and Strenio. Commission Lamboley concurred. Chairman Taylor was absent and did not participate in the disposition of this proceeding.

JAMES H. BAYNE
Secretary

[SEAL]

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85-792

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
UNITED TRANSPORTATION UNION, RESPONDENTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, *et al.*, INTERVENORS

No. 83-2317

UNITED TRANSPORTATION UNION, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, *et al.*, INTERVENORS

Petitions for Review of Orders of the
Interstate Commerce Commission

Argued December 4, 1984

Decided May 3, 1985

Harold A. Ross, with whom *Gordon P. MacDougall* was on the brief, for petitioner in No. 83-2290.

John O'B. Clarke, Jr. for petitioner in No. 83-2317.

Sidney L. Strickland, Jr., Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, and *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, *J. Paul McGrath*, Assistant Attorney General, and *John J. Powers, III* and *Frederic Freilicher*, Attorneys, Department of Justice, were on the brief, for respondents.

John H. Caldwell, Denise M. O'Brien, and *Kendall T. Sanford* were on the brief for intervenor Denver & Rio Grande Western Railroad Company.

James M. Verner, Ronald B. Natalie, Joseph L. Manson, III, and *Michael E. Roper* were on the brief for intervenor Missouri-Kansas-Texas Railroad Company. *William C. Evans* entered an appearance for that intervenor.

James V. Dolan, Nina K. Wuestling, Charles A. Miller, and *Gregg H. Levy* were on the brief for intervenors Union Pacific Railroad Company and Missouri Pacific Railroad Company.

Before WRIGHT and MIKVA, *Circuit Judges*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

Dissenting opinion filed by *Senior Circuit Judge* MACKINNON.

WRIGHT, *Circuit Judge*: Two unions—the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU)—object to the Interstate Commerce Commission's interpretation of labor issues arising from ICC's approval of a railroad consolidation.

The unions claim that, when the dust settled from the consolidation, certain railroads had effectively squeezed them out of their previous role in determining the crews used on particular routes. At the time, in early 1983, the unions objected and argued that the railroads' actions violated statutory labor protections. Since the railroads responed that ICC had given them full crew selection rights in the consolidation approval, the unions appealed to ICC for an order clarifying that its general consolidation approval did not affect previous labor arrangements, including crew selection rights.

In two decisions ICC rejected the unions' arguments. It maintained that the railroads' intentions on crew selection had been clear in the consolidation as approved and that ICC's authority to exempt transactions from legal obstacles, 49 U.S.C. § 11341(a) (1982), immunized these crew selection prerogatives from later attack.

The unions now petition this court to vacate those ICC decisions. Four railroads—the Denver & Rio Grande Western (D&RGW), the Missouri-Kansas-Texas (MKT), the Missouri Pacific (MP), and the Union Pacific (UP)—are intervening in support of the Commission.

Because we find that ICC made no semblance of a showing that the exemption was necessary, as required by the exemption authority section, we vacate the ICC decisions.

I. BACKGROUND

A. *Legal Framework*

This case presents the intersection of two statutory mandates—ICC's exclusive authority to approve rail consolidations under the Interstate Commerce Act and the statutory protection for rail labor employees under both the Railway Labor Act and the Interstate Commerce Act. The unions argue that (1) ICC did not show a necessity for waiving the Railway Labor Act in the exercise of its Interstate Commerce Act approval authority, and (2) ICC *cannot* waive the Interstate Commerce Act's labor protection conditions in the exercise of that approval authority. Ultimately, we find the Railway Labor Act argument dispositive, and we vacate the ICC decisions on that basis. To fully understand the texture of this dispute, however,

it is necessary to examine the Interstate Commerce Act labor protection conditions as well.

1. *ICC's approval authority.* Under the Interstate Commerce Act, ICC has exclusive authority to approve certain consolidations and mergers. 49 U.S.C. § 11341 *et seq.* (1982). The Act enumerates the types of transactions to which ICC's approval authority applies, *id.* § 11343, and the considerations that must guide ICC, *id.* § 11344. Most significantly for this appeal, "[a] carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction." *Id.* § 11341(a). Thus ICC has the power to approve a transaction and exempt its participants from legal obstacles that would impede its fruition.

In the exercise of this authority to exempt consolidations from the constraints of applicable statutes, ICC has certain ultimate constraints on its broad authority. First, there is a necessity component to the plenary authority: the statute specifies that ICC may exempt transactions from applicable laws "*as necessary*" for completion of the transaction. Second, as with any agency action, ICC's exercise of its authority must comport with the requirements of reasoned decisionmaking. *See generally United States v. ICC*, 396 U.S. 491 (1970).

2. *Labor protection requirements.* Statutory protections for railroad employees have received considerable congressional attention. Two important statutory vehicles for the current labor protection requirements are the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (1982), and the Interstate Commerce Act's labor protection section, 49 U.S.C. § 11347.

The Railway Labor Act creates a highly structured system for administering and resolving labor disputes. In passing the Railway Labor Act Congress sought, in part,

"[t]o avoid any interruption to commerce * * *, to forbid any limitation upon freedom of association among employees * * *, [and] to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions[.]" 45 U.S.C. § 151a. The statute specifies eleven general duties of rail carriers, *id.* § 152. It also creates a variety of mechanisms to settle rail labor disputes—a National Railroad Adjustment Board, *id.* § 153, a National Mediation Board, *id.* §§ 154-155, and a system of arbitration, *id.* §§ 157-159. The statute gives special attention to changes in rates of pay, rules, and working conditions. It provides that employers give employees the opportunity for negotiation and mediation before implementing such changes. *Id.* § 156; *see also id.* § 152, Seventh duty. The Railway Labor Act thus stands as an important structure for maintaining labor peace and fairness.

The Interstate Commerce Act labor protection section, 49 U.S.C. § 11347, affords employees substantial protection from the effects of mergers and consolidations. Such labor protection conditions have a long history. *See New York Dock Railway v. ICC*, 609 F.2d 83, 86-90 (2d Cir. 1979). In its current version the section provides that, in the exercise of its approval authority, "the Interstate Commerce Commission *shall require* the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976 * * *." 49 U.S.C. § 11347 (emphasis added).

ICC has specified the particular conditions that must be observed for this Section 11347 requirement. The conditions for protecting labor in a *merger* are known as *New York Dock* conditions, *see New York Dock Railway*, 360 ICC 60 (1979), *aff'd sub nom. New York Dock Railway v. ICC, supra.* The conditions for protecting labor in *transfers of trackage rights* are known as *Norfolk & Western* conditions, *see Norfolk & Western Railway Co.*, 354 ICC 605 (1978), *modified by Mendocino Coast Rail-*

way, Inc., 360 ICC 653, 664 (1980), *aff'd sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2d 1248 (D.C. Cir. 1982). These conditions include negotiation and mediation for dismissal and displacement of employees, 354 ICC at 610-611, 360 ICC at 85; dismissal and displacement compensation, 354 ICC at 611-612, 360 ICC at 86; and a system of arbitration, 354 ICC at 613, 360 ICC at 87-88. Generally, the conditions provide that "[t]he rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." 354 ICC at 610, 360 ICC at 84. ICC has thus established conditions for discharging its statutory responsibility to protect labor benefits in the midst of consolidations.

In short, ICC has authority to approve certain transactions, even to the extent of exempting the transactions from other laws. At the same time, the Railway Labor Act structures rail labor relations, and the Interstate Commerce Act's labor protection section gives rail employees a measure of protection from the effects of rail transactions.

B. *The Current Dispute*

This dispute has three important stages: (1) ICC's consolidation approval in 1982; (2) the post-approval conflict over crew selection; and (3) the two ICC decisions in 1983.

1. *ICC approval for the consolidation.* In 1982 UP and MP applied to ICC for approval of a consolidation under ICC's exclusive authority.[1] Several railroads and several unions (including the petitioners) objected to the proposed consolidation. On October 20, 1982 ICC ap-

[1] Western Pacific Railroad Company was also involved in the consolidation, but its role is not relevant to these petitions.

proved the consolidation, but it also approved the application of two railroads for "trackage rights"[2] over specified MP routes to ameliorate possible anticompetitive effects. D&RGW received trackage rights for one route (Pueblo, Colorado to Kansas City, Missouri), and MKT received trackage rights for several other routes. *See Union Pacific-Control-Missouri Pacific*, 366 ICC 459 (1982), *affirmed in part and remanded in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (*per curiam*), *cert. denied*, 53 USLW 3597 (Feb. 19, 1985). These are the four railroads who are intervening in support of the ICC decisions—the two who received ICC approval of their consolidation (UP and MP) and the two who received trackage rights for MP routes as conditions of that approval (D&RGW and MKT).

In their applications for trackage rights D&RGW and MKT both commented on crew selection. D&RGW specified that it could, at its option, use its own crews when it used the newly granted trackage rights, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8) (*cited in* ICC Decision of October 25, 1983, Joint Appendix (JA) 164); MKT specified that it *would* use its own crews, Finance Docket No. 30,000 (Sub-No. 25) (MKT-25) (*cited in* ICC Decision of October 25, 1983, JA 164).

In granting the trackage rights ICC did not mention crew selection. The Commission primarily addressed the need for the trackage rights to prevent possible anticompetitive effects from the consolidation. 366 ICC at 566-568, 572-578. Indeed, the Commission denied part of MKT's application for trackage rights because it did not agree that these trackage rights were needed to promote

[2] "Trackage rights" give one railroad the right to run its trains over another railroad's tracks. Indisputably, trackage rights are "'subject to * * * specific negotiations,'" dissent at 18. They are also subject to governing statutes and to the conditions of the Commission's approval, including the imposition of general labor protection conditions.

competition. *Id.* at 570-572. Notably, ICC emphasized that its general trackage rights approval was subject to the *Norfolk & Western* conditions that protect workers' rights in trackage rights situations. 366 ICC at 654; *id.* at 621-622. This statement was ICC's only reference to labor arrangements in the use of trackage rights.

2. *The crew assignment controversy.* After the consolidation became effective, the railroads began performing their approved trackage rights operations. D&RGW temporarily used MP crews on the MP routes, but claimed that it would soon use its own crews. Exhibit A to BLE's Petition for Clarification of ICC's October 20, 1982 decision, JA 6. MKT, meanwhile, began using its own crews. UTU's Petition for Reconsideration of ICC's denial of BLE's Petition for Clarification at 3, JA 74. The unions objected. They claimed that the unions representing MP employees had an established right to a role in crew assignment and that the railroads were changing that condition without consulting them. Both D&RGW and MKT, however, claimed that the ICC approval of their applications gave them a right to use their own crews and that ICC's exemption authority immunized this right from later legal challenge. MP's Reply to BLE's Petition for Clarification at 11, JA 24; UTU's Petition for Reconsideration at 3-4, JA 74-75.

D&RGW also made an additional argument. The Atchison, Topeka, & Santa Fe Railway Company had challenged D&RGW's temporary use of MP crews in the trackage rights as anticompetitive and impermissible. On November 24, 1982 and January 18, 1983 ICC issued decisions rejecting the challenge and upholding D&RGW's plans, including the preliminary decision to use existing MP crews. The Commission noted that D&RGW had the choice of using its own crews; the Commission did not mention any lurking labor relations issues. ICC Decision, November 24, 1982, at 3 (D&RGW brief, Appendix B); ICC Decision, January 18, 1983, at 3 (*id.*, Appendix C). In response to the unions' challenge, D&RGW claimed

that these ICC decisions settled the validity of its crew selection plans. Reply of D&RGW to BLE's Petition for Clarification, JA 9-10.

Initially, the two unions responded to the railroads' position on crew selection in different ways. The United Transportation Union threatened to strike over the crew assignment issue. MP sought an injunction preventing the threatened strike. On March 1, 1984 the District Court for the Eastern District of Missouri issued such an injunction. *Missouri Pacific R. Co. v. United Transportation Union*, 580 F.Supp. 1490 (E.D. Mo. 1984). An appeal from that injunction is pending.

The Brotherhood of Locomotive Engineers took a different tack. On April 4, 1983 it filed a petition with the Commission and requested clarification that the consolidation approval did not alter previous labor arrangements, particularly with respect to crew selection. BLE claimed that the normal Railway Labor Act and Interstate Commerce Act labor protection conditions (§ 11347) should apply. BLE's Petition for Clarification, JA 2-4. After ICC rejected BLE's interpretation in a May 18, 1983 decision, UTE joined BLE in a May 31 petition requesting reconsideration. On October 25, 1983 the Commission elaborated on its earlier decision and continued to reject the union's contentions.

3. *The ICC decisions.* In its May 18 decision refusing BLE's request, ICC maintained that it had already decided the issue of crew selection. The Commission claimed that it had exempted the crew selection provisions, which it had not mentioned in its decision, from all legal obstacles because those provisions were in the trackage rights applications. "Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. * * * We have broad authority to impose conditions on consolidation and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using

their own crews." ICC Decision of May 18, 1983 at 4-5, JA 36-37. ICC did not specifically address the Railway Labor Act and Section 11347 arguments. Thus in its May decision ICC implied that it had immunized the crew selection prerogatives from legal obstacles by dint of having approved the trackage applications.

In its October decision the Commission again denied the unions' request. It rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary to the transaction. "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints." ICC Decision of October 25, 1983 at 7, JA 163. The Commission similarly rejected the claim that Section 11347 rights were being violated. "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transactions." *Id.* at 6, JA 162. The Commission thus continued to maintain that it had immunized the crew selection from all subsequent legal obstacles, and it continued to offer no analysis of the necessity of this immunity for completion of the transaction.

The unions filed petitions to this court. They claim that ICC exceeded its authority by unjustifiably waiving the Railway Labor Act and the Interstate Commerce Act labor protection conditions.

II. Threshold Issues

Before reaching the statutory issues, we must consider two threshold issues: timeliness and issue preclusion.

A. *Timeliness*

ICC and the four intervening railroads argue that the unions are barred because their appeal is not timely. We disagree.

The timeliness dispute turns on the interpretation to be given various Commission actions. The jurisdictional statute permits judicial review if an appeal of a final order is filed within 60 days. 28 U.S.C. § 2344 (1982). The railroads and ICC contend that ICC's final order on crew selection prerogatives issued on October 20, 1982 (the decision giving general approval for the UP/MP consolidation, subject to the grant of trackage rights to D&RGW and MKT). They argue that the unions' appeals for clarification in April 1983 (resulting in the May 1983 decision) and May 1983 (resulting in the October 1983 decision) are entitled to no weight because those ICC decisions were merely procedural refusals to reopen a matter decided in the October 1982 order.

The railroads and ICC rely heavily on *Nat'l Bank of Davis v. Office of Comptroller of Currency*, 725 F.2d 1390 (D.C. Cir. 1984) (*per curiam*). In that case the court ruled that a petition for review was not timely when petitioner took no action during the statutory time period of 30 days, asked the agency to reconsider two months after the decision, and sought to invoke the court's jurisdiction by filing a petition for judicial review within 30 days after the agency denied the petition for reconsideration. The railroads and ICC argue that, similarly, in the case on appeal, the unions seek to make their petition timely by dating the time period for judicial review only from the procedural refusal to reopen a previous proceeding.

Their reliance on *Davis* is misplaced. As this court observed some time ago in *Investment Company Institute v. Board of Gov. of FRS*, 551 F.2d 1270, 1281-1282 (D.C. Cir. 1977), and very recently in *Eagle-Picher Industries, Inc. v. EPA*, —— F.2d ——, —— (D.C. Cir. No. 83-2259, decided April 16, 1985) (slip op. of Edwards, J.

at 13-19), time limits on review may, in exceptional circumstances, be "excused" when an issue is not ripe for review during the statutory period. As we emphasized in *Eagle-Picher*, petitioners generally are obliged to seek judicial determination of the *ripeness* of their claims during the statutory period. "In general, we will refuse to hypothesize whether, in retrospect, a claim would have been deemed ripe for review had it been brought during the statutory period, in order to save an untimely claim." —— F.2d at ——, slip op. at 6. However, we specifically noted that "[e]xceptions occasionally may be justified in the light of changed circumstances giving rise to a new cause of action beyond the statutory period for review; compelling case precedent that makes it clear beyond doubt that the claim was not ripe during the statutory period; or clear evidence that a failure to consider a petitioner's claims would work a manifest injustice." *Id.*

The instant case clearly presents a situation in which the petitioners' claim ripened after the expiration of the statutory period due to changed circumstances resulting from a misleading statement of position by ICC. The petitioners had no notice of their present claim until after ICC denied their petition for clarification and reconsideration thereof. In its initial decision, the ICC specifically said that the statutory labor protection conditions would apply and, thus, it would have been premature for the unions to have claimed that the conditions were being violated. The Commission and the railroads argue that the trackage applications specifically noted that D&RGW *might*, and MKT *would*, use their own crews, and thus there was no ripeness problem. However, those applications were bounded by ICC's general pronouncement that the labor protection conditions would not be violated. As soon as it became apparent that MKT intended to use its own crews, the unions petitioned ICC for clarification of the application of the labor protection conditions. The issue did not become ripe for judicial

review until the Commission had specified that crew selection was exempt from all otherwise applicable legal requirements.[3]

Nor can it be claimed that the petition should be barred because it was not filed within 60 days after the May decision. For the Commission then undertook extensive review and issued a lengthy opinion in October. If the motion for reconsideration is filed within the statutorily prescribed review period, the time limitation tolls until the agency issues its final decision on the motion for reconsideration, *see Outland v. CAB*, 284 F.2d 224 (D.C. Cir. 1960); *Davis, supra*, 735 F.2d at 1391 n.5, and it is tolled while the agency is giving full consideration to the issues presented for judicial review, *see Nat'l Insulation Transportation Committee v. ICC*, 683 F.2d 533, 543 n.17 (D.C. Cir. 1982).

The railroads and the Commission also claim that the petition should be barred as untimely because ICC clarified its policy on crew assignment in decisions issued on November 24, 1982 and January 18, 1983. At that time D&RGW had not exercised its option to use its own crews; the Atchison, Topeka & Santa Fe Railway was protesting its use of MP crews as anticompetitive. In its decisions ICC noted that D&RGW had the option of using its own crews. The argument that this statement

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[3] The dissent's extended timeliness objection rests on a single mistaken assumption: "Though these labor protections were held to be applicable in general, * * * they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applications approved by the final order of the Commission." Dissent at 3. Unfortunately, not one word of ICC's October 1982 decision suggested that its unequivocal commitment to labor protection conditions was somehow "inapplicable to the crew selection issue." From all appearances, ICC's imposition of labor protection conditions qualified its approval of the crew selection applications, rather than the reverse. Therein lies the nub of this case and the reason why petitioners' claim was, in fact, not ripe until ICC modified that earlier commitment in the proceedings at issue.

should have put the unions on notice is unconvincing: nothing suggested that ICC had changed its view that the general labor protection conditions would apply in full force. The dispute is not over whether the railroads could use their own crews; it is whether they could use their own crews subject to the requirements of the labor protection conditions. Before May 1983 the Commission never suggested that D&RGW and MKT could use their own crews *without* observing the basic labor protection conditions. And before the railroads refused to negotiate in early 1983 the unions had no reason to appeal to the Commission for clarification. Thus the November 1982 and January 1983 decisions should not stand as a bar: although those decisions suggested that the railroads could use their own crews, ICC did not suggest that they could do so without observing the basic labor protection conditions.

Finally, pointing to the principle that parties should raise their objections in administrative proceedings, *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33 (1952), the railroads and ICC claim that the unions should have raised their objection in the October 1982 proceeding. However, in the administrative proceedings the unions did argue for vigorous labor protections, 366 ICC at 621-622. As discussed, it was not until the May decision that the unions should have realized that the labor protection conditions would not be fully applicable to crew selection.

B. *Issue Preclusion*

MKT raises an additional threshold objection. It claims that the crew selection issues were decided in the opinion accompanying the Missouri District Court's injunction prohibiting UTU from striking, *see Missouri Pacific R. Co. v. United Transportation Union*, *supra*, 580 F. Supp. 1490, *appeal pending*, and that issue preclusion prevents this court from reaching the issues. This argument is frivolous. Despite broad dicta, the District

Court recognized that it had no power to consider the validity of ICC orders. *See id.* at 1502 ("The United States Courts of Appeals are vested with exclusive jurisdiction to determine the validity of orders of the ICC."). Thus there can be no preclusive effects on this court's review of the validity of the ICC order. *See* 18 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4420 (1981) ("The fundamental rationale of issue preclusion dictates the clearly settled requirement that it be limited to matters that have been actually decided.").

We thus reject the threshold objections and turn to the merits of the unions' contentions.

III. STATUTORY ISSUES

The unions raise two statutory arguments: (1) ICC offered no inkling of a justification for the view that waiving the Railway Labor Act with respect to crew assignment was necessary to effectuate the transaction, and (2) the Interstate Commerce Act labor protection conditions (49 U.S.C. § 11347) may not be waived because the labor protection section specifically qualifies ICC's consolidation approval authority (49 U.S.C. § 11341). We find the first argument decisive.

The unions claim that ICC has wholly failed to justify the necessity for waiving the Railway Labor Act's applicability to the crew selection issue. The Commission claims that no such justification is necessary.

Although an agency receives deference in interpreting its organic statute, the agency's authority is not unbounded. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, —— U.S. ——, —— & n.8, 104 S.Ct. 439, 444 & n.8 (1983). In reviewing an agency's interpretation we must consider whether it is within the delegation to the agency envisioned by Congress. *State of Montana v. Clark*, 749 F.2d 740, 744-747 (D.C. Cir. 1984). Our analysis must begin with the language of Congress. "If

the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, —— U.S. ——, ——, 104 S.Ct. 2778, 2782 (1984).

The statutory language dictates that the Commission's exemption authority applies only "as necessary" to allow transactions to occur. 49 U.S.C. § 11341(a). Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.

This statutory limit on the Commission's authority creates certain responsibilities for ICC. In exercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.[4]

This necessity component of ICC's waiver authority has not frequently arisen in the case law. In part this is because, in many of the ICC waiver authority cases, the necessity for the waiver is clear; the battle is fought over whether the waiver and transaction are in the public interest. *See, e.g., United States v. ICC, supra*, 396 U.S. 491. However, ample precedent supports the view that the Commission must supply some basis for a neces-

[4] This is not to say that the ICC must enumerate every legal obstacles that is waived in its approval. Such a requirement might undermine the approval authority's purpose of "facilitat[ing] merger and consolidation in the national transportation system," *County of Marin v. United States*, 356 U.S. 412, 416 (1958), because some legal obstacles to fruition of the transaction may not be entirely foreseeable at the time of approval. But ICC's decisionmaking process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction.

sity determination before the exemption authority applies. In one line of cases the Supreme Court has assumed that ICC may waive state laws only if those state laws pose an obstacle to the transaction. *See Callaway v. Benton*, 336 U.S. 132, 140-141 (1949) (waiver authority applies to "state laws interposing obstacles in the path of otherwise lawful plans of reorganization"); *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 126 (1948); *Texas v. United States*, 292 U.S. 522, 534-535 (1934).[5] Furthermore, the Supreme Court has stressed that the words of ICC's approval authority section must be carefully scrutinized to ensure that ICC does not exceed its statutory powers, *County of Marin v. United States*, 356 U.S. 412 (1958), and that ICC's approval authority, though broad, is ultimately reviewable as an exercise of reasoned decisionmaking. *See United States v. ICC, supra; Seaboard Air Line R. Co. v. United States*, 382 U.S. 154 (1965); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173 (1959); *McLean Trucking Co. v. United States*, 321 U.S. 67 (1944).

Other courts have also emphasized that there must be a basis in the record for the conclusion that the statutory waiver is necessary to the transaction. In *City of Palestine, Texas v. United States*, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), the Fifth Circuit provided an extensive analysis of this necessity problem. In vacating ICC's determination that it had

[5] *Schwabacher v. United States*, 334 U.S. 182 (1948), also supports this analysis. As the Fifth Circuit has explained, "In *Schwabacher* * * * the insistence of further compensation by preferred stockholders of a merging company exceeded the compensation found just and reasonable in the ICC's approved plan of merger. In each of these [Supreme Court] cases the voided state-related provision impinged upon the effectuation of the transaction. * * * In *all* of the cases approving the ICC's nullifications of state law, *the laws stood in the way of the approved transaction.*" *City of Palestine, Texas v. United States*, 559 F.2d 408, 414-415 (5th Cir. 1977) (emphasis added), *cert. denied*, 435 U.S. 950 (1978).

waived certain contractual obligations the court stressed: "The ICC exceeds the scope of its authority when it voids contracts that are not germane to the success of the approved * * * transaction. In its grant of approval authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency *unless those laws or contracts interfered with carrying out an approved merger.*" *Id.* at 414 (emphasis added). Similarly, in an earlier case the Fifth Circuit noted that ICC approval of a carrier's plans did not automatically remove the requirements of the Railway Labor Act and the Norris-LaGuardia Act. *Texas & New Orleans R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). *See also Interstate Investors, Inc. v. Transcontinental Bus System, Inc.*, 310 F.Supp. 1053, 1068 (S.D. N.Y. 1970) (court must determine whether waiver of antitrust laws is "necessary" to completion of transaction).[6]

With these principles in mind, the current dispute comes clearly into focus. ICC claims that the Railway Labor Act was a "law" appropriately waived in the exer-

[6] ICC relies on *Bhd of Locomotive Engineers v. Chicago & Northwestern R. Co.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), to support its position. In that case the Eighth Circuit affirmed an ICC order approving a railroad-union labor agreement and specified that the Railway Labor Act would not apply. The government claims that *C&NW* stands for the proposition that the immunity is automatic and requires no finding of necessity. However, *C&NW* fails to carry the day for several reasons. First, *C&NW* itself recognized that immunity attached only to obstacles that would frustrate fruition of the merger. *Id.* at 432. Second, *C&NW* distinguished, but did not disagree with, *Texas & New Orleans R. Co. v. Bhd of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). 314 F.2d at 433. And third, *C&NW* was explicitly limited to its facts. *Id.* at 434. *C&NW* did say that no *statement* of necessity was required. *Id.* at 432. To the extent that *C&NW* may be read to say that ICC need supply no *basis* for the necessity determination, we find that interpretation ill-conceived and reject it.

cise of its exclusive authority. ICC's analysis of the necessity for waiving the Railway Labor Act, however, is virtually nonexistent, both in the 1982 decision and in the 1983 decisions. In the 1982 decision ICC never offered a word about waiving the Railway Labor Act with respect to the crew assignment in the trackage rights, much less the necessity for doing so. As noted, it merely approved the trackage applications and specified that the labor protection conditions applied in full. In the 1983 decisions ICC continued to give no necessity justification for the waiver of the Railway Labor Act. It claimed that "[t]he terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints." ICC Decision of October 25, 1983, JA 163. In its proceedings, then, the Commission did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act.[7]

ICC's complete failure to justify the necessity for waiving the Railway Labor Act respecting crew selection is especially conspicuous in light of evidence sug-

[7] ICC points to its October decision statement that "[t]he approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement," ICC Decision of Oct. 25, 1983 at 15, JA 171. It then claims that this reference to "material terms" provides a sufficient basis for immunity because crew selection was a "material term" of the trackage rights transaction. However, merely stating in totally conclusory terms that something is a "material term" is inadequate to provide the basis for the conclusion that waiver is necessary to fruition of the transaction, as § 11341(a) requires. We do not, as the dissent suggests, "attempt[] to disregard" this statement. Dissent at 19. Rather, we search in vain for the articulated, rational explanation of this purported finding that elementary principles of reasoned decisionmaking clearly demand. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

gesting that the issue would *not* interfere with the trackage rights. First, the Commission specifically left the question of trackage compensation open to later negotiation between the railroads, 366 ICC at 589-590; it never suggested why the question of crew selection was somehow so much more necessary to fruition of the transaction that normal Railway Labor Act procedures could not apply to the issue of crew selection. Second, ICC noted that MKT might find it necessary to use more crews than it suggested in its application, 366 ICC at 569-570; again, the Commission never suggested why the question of crew selection was so much more necessary to fruition of the transaction. On both of these issues, then, the Commission expressed a willingness to leave subsidiary trackage issues to later determination. Finally, the Denver & Rio Grande operated for some months with existing Missouri Pacific crews, and there has been no suggestion that the trackage rights were somehow frustrated as a result.[8]

In short, ICC has given no justification for a view that waiver of the Railway Labor Act is necessary to effectuate the transactions at issue. Indeed, the evidence in the record strongly suggests the contrary conclusion. The Commission therefore exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection.

In view of this disposition, it is unnecessary to reach the second statutory issue—whether ICC may ever waive the labor protection condition section (§ 11347) through the exercise of the exemption authority (§ 11341(a)).

[8] The dissent's vehement protestations about the "pro-competitive purpose" of the trackage rights approval are wide of the mark. For the question is whether the issue of *crew selection* somehow goes to that "pro-competitive purpose." ICC has never given the faintest hint of a reasoned explanation why crew selection is so essential to that purpose that the otherwise applicable provisions of the Railway Labor Act must be waived. Indeed, as discussed above, the evidence in the record indicates otherwise.

That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.[9]

We thus vacate the 1983 orders and leave the parties to their Railway Labor Act remedies. In doing so we intimate no view on the merits of the unions' claims about their underlying right to a role in crew selection The Railway Labor Act is designed to resolve such issues, and we leave the parties to the mechanism created by Congress.[10]

So ordered.

[9] The unions have argued that the Railway Labor Act and § 11347 rights are largely coextensive in this case, and we thus view the Railway Labor Act argument as dispositive. To the extent that there is a meaningful difference between the Railway Labor Act and § 11347 protections, the unions have not argued it, and we need not address the issue. In any event, we note that our decision vacates the ICC decisions in their entirety.

[10] The dissent professes some puzzlement at the reason for vacating the ICC decisions. The reason is clear. This issue belongs within the structure created by the Railway Labor Act. Holding so does not assume "a conflict between the approved crew selection provisions and the unions' asserted rights." Dissent at 8. Rather, it leaves that question to the mechanisms created by Congress. That, of course, is the reason we do not "indicate what the parameters of the unions' claimed rights might be," *id.*: under the statutory scheme, it is not, at this point, our province to do so. All we decide is that ICC's claimed exercise of exemption authority was insufficient to immunize crew selection from the provisions of the Railway Labor Act.

MACKINNON, *Senior Circuit Judge* (dissenting): This case involves the consolidation of the Union Pacific Railroad Company ("UP"), the Missouri Pacific Railroad Company ("Missouri Pacific"), and the Western Pacific Railroad Company ("WP"), thus forming one of the nation's largest railroads. In an October 20, 1982 decision, the ICC granted specified trackage rights, over two sections of the Missouri-Pacific lines, to two railroads that would be harmed by the consolidation, the Missouri-Kansas-Texas Railroad Company ("Katy") and the Denver and Rio Grande Western Railroad Company ("Rio Grande"). The Commission authorized these two railroads to use their own crews to operate their own trains while exercising such trackage rights. My colleagues rule that the Commission has failed to find that it was "necessary" to the approval of the trackage rights applications and the underlying Union Pacific-Missouri Pacific-Western Pacific consolidation to waive any applicable protective labor conditions. In my view, the majority has ignored the clear import of the record and, in a decision that pays lip service to our prescribed standard of review, substituted its judgment for that of the ICC. I therefore respectfully dissent.

I.

The majority holds first that the claims of the petitioning unions are not barred for being untimely because the October 20, 1982 ICC decision was not final and thus did not make the issue of crew selection ripe for review. I cannot agree with the majority's analysis.

This case began on September 15, 1980, when the UP, the Missouri Pacific, and the WP filed jointly for approval to consolidate. After the application was made public, 45 Fed. Reg. 68484 (1980), various parties entered the fray either to support or oppose the application. On January 13, 1981, the Katy and the Rio Grande opposed the consolidation and filed separate applications

seeking protective trackage rights and other compensatory rights they alleged were necessary in order both to ameliorate the anticompetitive harms of the proposed consolidations and to protect them from revenue losses necessary to continue essential services.

The Katy sought trackage rights to operate over Missouri Pacific's tracks between Kansas City, Kansas, and Omaha, Nebraska, a distance of approximately 200 miles. The proposed operating agreement, as submitted to the ICC for approval, specified the operating conditions for the joint trackage rights and specifically stated:

> MKT [Katy], *with its own employees*, and at its sole cost and expense, *shall* operate its engines, cars and trains on and along Joint Track.

Finance Doc. No. 30,000 (Sub-No. 25) 1, Exh. No. 2 at 5 (emphasis added). The Rio Grande was harmed by the merger both at the Utah and the Pueblo, Colorado gateways. It sought joint trackage rights to operate over Missouri Pacific's tracks between Pueblo, Colorado, and Kansas City, Missouri, a distance of 619 miles. Its trackage rights application submitted for ICC approval stated:

> Rio Grande *may, at its option, elect to employ its own crews* for the movement of its trains, locomotives and cars to points on or over the Joint Track.

Id. (Sub- No. 18), Rio Grande Proposed Agreement § 6 (c) (3) (emphasis added). Thus, both railroads *expressly* requested ICC authority to use their own crews while operating their own "trains, locomotives and cars" over joint trackage with the Missouri Pacific.

On February 20, 1981, the Katy and the Rio Grande filed verified statements with the ICC in support of their applications for joint trackage rights. These statements indicated further that if the trackage rights were granted, the railroads would use their own crews. Verified Statements of Adolf Nance and Harold Hacker, quoted in J.A. at 165. In ruling on the applications, the

implicit issue for the ICC was the degree of anticompetitive harm to which the Katy and Rio Grande would be subjected and accordingly what amount of compensatory rights would be *necessary* to protect the liability of the applicant railroads and to guarantee that they would furnish the necessary competition to the merged railroads. The petitioning unions, the Brotherhood of Locomotive Engineers ("Engineers" or "union") and the United Transportation Union ("UTU" or "union"), participated in the ICC proceedings and submitted evidence in opposition to the joint trackage rights applications. Hearings proceeded for eleven months, ending in January, 1982. There is no indication, however, that petitioners ever contended that UP or Missouri Pacific employees had a right to participate in the crew selection decision.

On October 20, 1982, the ICC approved the consolidation of the UP, the Missouri Pacific, and the Western Pacific and made the consolidation subject to the usual labor protective conditions set forth in *New York Dock Ry.—Control—Brooklyn Eastern Dist. Terminal*, 360 I.C.C. 60 (1979). As part of the consolidation, while disapproving other requested compensatory conditions, the ICC specifically approved the applications of the Katy and the Rio Grande for the trackage rights described above, subject to the labor protection conditions specified in *Norfolk & Western Ry. Co.—Trackage Rights —Burlington Northern, Inc.*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 665 (1980). *Union Pacific Corp., Pacific Rail System, Inc., and Union Pacific R.R. Co.—Control—Missouri Pacific Corp. and Missouri Pacific R.R. Co.*, 366 I.C.C. 459, 654 (1982). Though these labor protections were held to be applicable in general, I think it is clear that they were to be inapplicable to the crew selection issue since the crew selection provisions constituted part of the trackage rights applications approved by the final order of the Commission. Moreover, unlike other trackage rights-related requests by the Katy and Rio Grande which the Commission denied, *see* Majority

Opinion at 20-21, there was no express denial of the crew selection requests. Therefore, the labor unions were on notice that the ICC had authorized the Katy and the Rio Grande to use their own crews in the operation of their own trains in the exercise of their joint trackage rights.

It was not until April 4, 1983, approximately five and one-half months after the ICC's decision approving the consolidation, that the Engineers filed a petition with the ICC seeking clarification of the October 20, 1982 decision. The ICC denied the Engineer's petition on the procedural grounds that crew selection had been an issue in the consolidation proceedings, that petitioners introduced no new evidence or arguments setting forth any issue in need of clarification, and that the issues involved had been decided in the Commission's October 20, 1982 decision. Following this denial, the UTU joined the Engineers in moving for reconsideration of the denial of the motion for clarification.

Time deadlines for requesting review of agency decisions are *jurisdictional* and cannot be enlarged by a reviewing court. *National Resources Defense Council v. NRC*, 666 F.2d 595, 602 (D.C. Cir. 1981); *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 388-89 (D.C. Cir. 1974). The Hobbs Act prescribes that judicial review must be sought within 60 days of a final order. 28 U.S.C. § 2344 (1982). An action of the Commission is final on the date on which it is served, and exhaustion of further administrative remedies is not required. 49 U.S.C. § 10327(i) (Supp. V 1981). The Commission's decision here was served on October 20, 1982. In this case, then, the statutory time period expired December 20, 1982. No judicial review was sought before that date.

We have also recognized that a party who had the opportunity to participate in the underlying proceedings is a party "aggrieved" under 28 U.S.C. § 2344. *See Simmons v. ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983). Yet I find no indication in the record or briefs that the Engineers or the UTU ever objected to the proposed crew

provisions on the grounds that labor protections would be violated by granting them. Whatever caused petitioners not to seek timely review, it was not any ambiguity in the ICC decision of October 20, 1982. Petitioners plainly slept on whatever rights that they contend they possessed.

Determined to reach the contentions raised by this petition, however, my colleagues accept the labor unions' argument that the crew selection issue was not ripe for review when the ICC served its decision. Petitioners contend that the issue was not ripe because the ICC's general pronouncement that the *New York Dock* and *Norfolk* labor protection provisions would apply somehow nullified the *express* statements in the applications regarding crew selection. The unions claim that they petitioned for clarification of the October 1982 decision as soon as it became apparent that the railroads intended to use their own crews, *i.e.*, when the railroads began to file their trackage rights agreements with the ICC. Brief of BLE at 8-9.[1] This claim should not be accepted as extending the time to appeal. The railroads at that time were doing nothing more than exercising the rights clearly granted them by the October 20, 1982 decision. The unions had been on notice since the day the applications for trackage rights were filed on January 13, 1981, that the railroads intended to use their own crews to operate their own trains if their applications for trackage rights were approved. The ICC's October 1982 decision approved those applications and authorized the use of the applicant's own crews in the operation of their own trains.

Moreover, I find the majority's analysis particularly difficult to swallow in light of *Eagle-Picher Industries, Inc. v. EPA*, No. 83-2259 slip op. (D.C. Cir. Apr. 16,

[1] This contention imposes on the credulity of the court. The unions, if they ever looked at the applications of the Katy or the Rio Grande, and with their interest and the competency of their lawyers they must be presumed to have done so, must have known perfectly well that if trackage rights were granted the applicants intended to use their own crews.

1985) (Opinion by Edwards, J.). In *Eagle-Picher* this court emphasized that "[a]s a general proposition . . . if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred." *Id.* at 17. "Consequently," this court concluded,

> except where events occur or information becomes available after the statutory review period expires that essentially creates a challenge *that did not previously exist* [emphasis added], or where a petitioner's claim is, under our precedents, *indisputably* not ripe until the agency takes further action, we will be very reluctant, in order to save a late petitioner from the strictures of a timeliness requirement, to engage in a retrospective determination of whether we would have held the claim ripe had it been brought on time.

Id. at 17-18. Under the *Eagle-Picher* analysis, at best petitioners must be said to have entertained "some" doubt about the ripeness of their claims. At worst, later occurrences did not create a challenge "that did not previously exist," nor were petitioners' claims "*indisputably* not ripe."

By this appeal petitioners plainly attempt to convert a petition to reconsider the denial of a motion for clarification into a challenge of a final decision by the ICC that granted the Katy and the Rio Grande the *right* to crew their own trains over joint trackage with the Missouri Pacific. Because the motion to clarify was denied on procedural grounds, the proper inquiry is whether the Commission's decision on the motion to reconsider the denial of the motion to clarify is a decision *on the merits*. A decision on the merits of the motion for reconsideration could extend the time period for seeking appellate review. *Bowman v. Loperena*, 311 U.S. 262 (1940). The majority, however, never reaches this question.

I thus disagree with the conclusion that the October 20, 1982 decision was not ripe for review. I am also disturbed by the ostensible ease by which the panel finds jurisdiction. Apparently, this court is not "fastidious about the impropriety of reaching merits issues without first establishing jurisdiction." *Beattie v. United States*, No. 84-5413 slip op. at 44 (D.C. Cir. Dec. 31, 1984) (Scalia, J., dissenting, opinion filed Feb. 26, 1985). *Compare Eagle-Picher, supra*, at 12 ("[p]roffered excuses for late filing are carefully scrutinized"). In my view, the very substantial delay of petitioners should not be so rewarded. My only solace lies in the hope that the majority's retrospective ripeness analysis is motivated by the fact that the present proceedings were conducted without the benefit of *Eagle-Picher*.

II.

Even assuming a finding of jurisdiction in this case is correct, the majority has clearly erred in its decision on the merits. It decides that because the ICC did not make an *express* finding that the waiver of any labor protections applicable to the crew selection provisions in the trackage rights applications was "necessary" to approval of the transaction, it exceeded its authority under the Interstate Commerce Act, 49 U.S.C. § 11341(a) (Supp. IV 1981), in excepting those provisions from any labor protections. Without explanation, though, the majority vacates the ICC's decision on crew selection and relegates that issue to *arbitration* under the Railway Labor Act, 45 U.S.C. § 151 *et seq.*

Why the lack of an express "necessity" finding in and of itself requires the court to vacate the ICC's approval regarding crew selection on this record is puzzling. The whole basis for granting the trackage rights, which included the crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger. Presumably, the majority

senses a conflict between the approved crew selection provision and the unions' asserted rights. The majority, however, if it knows, does not indicate what the parameters of the unions' claimed rights might be and similarly fails to state where, if anywhere, these rights and applicable labor protections intersect. For all the majority indicates, they may not conflict at all. Indeed, this was the conclusion reached by the ICC (J.A. 163-64). Obviously, if there is no conflict, there is no need to *vacate* the Commission's decision on crew selection. Yet, in the absence of any evidence supporting the unions' claims, and in the face of justifications for the ICC's decision, the majority, without further inquiry, leap frogs the Commission's findings and completely nullifies the *authority* of the ICC to provide for crew selection in trackage rights agreements imposed to ensure that consolidations are in the public interest. The majority's reasons for doing so are inexplicable.

The arguments of the Engineers and the UTU, and the majority decision itself, are based on the fundamental assertion by the unions that they enjoy by custom and by collectively-bargained agreements a right to crew all trains passing over the Missouri Pacific's tracks. This is tantamount to a declaration that the unions, in effect, have a proprietary interest in the tracks of their employer—an astonishing contention. Also implicit in the unions' assertion is the claim that the unionized employees of the consolidated railroads (the Missouri Pacific, UP, and WP) have a colorable right to bargain *with the Katy and the Rio Grande* over who will crew the trains of the latter railroads. There is no basis in law or fact for such an absurd conclusion. It is basic contract law that one cannot be bound by agreements between third parties. Even assuming such rights might exist, the ICC found that "the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargain-

ing agreements to participate in the crew selection process" of foreign railroads operating under trackage rights (J.A. 168). However, the majority today rules that the mere *pleading* of such rights, without more, trumps the authority vested in the ICC to make crew selection decisions regarding trackage rights.

In my opinion the court errs partly because it confuses the issue in this case. It states that "[t]he dispute is not over whether the railroads could use their own crews; [the dispute] . . . is whether they could use their own crews subject to the requirements of the [statutory] labor protection conditions." Maj. Op. at 14. The ICC's October 20, 1982 decision stated that the labor protections *would* apply to the transaction. As previously explained, the ICC saw no apparent conflict between the protective labor conditions and its decision to permit crew selection by the railroads who operate the trains. But in its 1983 decisions, in an effort to meet the unions' scattered arguments, the Commission ruled in the alternative that the crew *selection* process was exempt from any labor protection conditions that *might* apply. In my view the issue in this case, assuming that the applicable labor provisions in the Act conflict with the proposed ICC action, is merely whether the ICC had the authority to so exempt the crew selection process from applicable labor protection conditions, and if so, whether it properly exercised that authority. In all other respects, the statutory labor protections still apply.[2]

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[2] *See* Brotherhood of Maintenance of Way Employees v. ICC, 698 F.2d 315, 317 n.6 (7th Cir. 1983) ("The adoption of standard conditions, routinely imposed, often results in incorporation of superfluous provisions having no application to the particular case under consideration.").

Because the majority did not reach the issue of whether the labor protections under 49 U.S.C. § 11347 can be exempted through § 11341(a)'s exemption power, I too express no view on that issue. However, it seems to me that in this case where the trackage rights applications were approved specifically to offset the anti-

The Interstate Commerce Act in section 11341(a) provides:

> The authority of the Interstate Commerce Commission under this subchapter is *exclusive*. . . . A carrier, corporation, or person participating in that transaction is exempt from the antitrust laws *and from all other law*, including State and municipal law, *as necessary to let that person carry out the transaction*, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. . . .

49 U.S.C. § 11341(a) (emphasis added). The authority granted the ICC under this statute is very broad. To the extent necessary to approve a transaction—the merger in this case—the ICC may exempt the carrier involved from "*all other law*." This is plain language, and there is nothing on which to base any contention that it does not mean exactly what it says, or that the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (1982)[3] is not a "law" subject to the exemption authority under § 11341(a).

In *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.* ("*North Western*"), 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), the court held that § 5(11) of the Interstate Commerce Act (now § 11341(a)) conferred exclusive and plenary jurisdiction upon the ICC to approve mergers and exempt the carrier from all other restraints of *federal law*, including the Railway Labor Act ("RLA"). *Id.* at 429, 431-32. In that pre-Staggers Act case, the court affirmed the order of the ICC that approved a stipulation by the carriers

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competitive harms of the consolidation, the unions' rights under *N&W* Art. I § 4 exist vis à vis the consolidating railroads and not against either the Katy or the Rio Grande.

[3] 45 U.S.C. § 152, Seventh, for example, forbids generally a carrier's change in pay, rules, or working conditions *contrary to labor agreements*, without resort to negotiation.

that overrode the RLA. The court rejected the union's claim, which is similar to that made here, that the ICC lacked jurisdiction because it failed to find *expressly* that the provisions of the Railway Labor Act were rendered inoperative. *Id.* at 432. Rather, the court agreed with the Commission's finding, as expressed in another proceeding, that "[t]he terms of this paragraph are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints." *Id.* (quoting *Chicago, St. Paul, Minneapolis & Omaha Ry. Lease*, 295 I.C.C. 696 (1958)).

In the present case the Commission similarly noted that the provisions of § 11341(a) provide "self-executing immunity on all material terms of the agreement . . . to the extent necessary to . . . implement[] the agreement" (J.A. 171) (emphasis added). Granted, *North Western*, *supra*, involved a stipulation by the carriers which required arbitration in a manner similar to that provided by the RLA. The majority, however, refuses to recognize the clear breadth of the ICC's authority expressed in *North Western*. Rather, it attempts to distinguish the case by noting how *similar* it is to the present case, *see* Maj. Op. at 19 n.6, a novel technique that substantially broadens the ability to reach the result desired by the majority.[4]

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[4] City of Palestine, Texas v. United States, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), relied on by the majority, does not support its position. In that case, the ICC was found to have exceeded its authority when it voided an agreement with the city of Palestine to maintain a certain number of employees there, which was "not *germane* to the success of the approved . . . transaction." *Id.* at 414 (emphasis added). In the present case, not only does the record support the fact that the crew selection provision was important to ameliorate the anticompetitive aspects of the proposed consolidation, the Commission itself found the provision "material" to and "related to the transportation effects" of the transaction (J.A. 170, 171). Similarly, Texas & New Orleans R.R. v. Board of Railroad Trainmen, 307 F.2d 151 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963), is not relevant to this case. That

The apparent ease by which the majority arrives at its conclusion is attributable in large part to its mischaracterization of Supreme Court precedent. Through the majority's misreading of these cases, it has manufactured a wholly new and more difficult ICC waiver standard. The majority claims support from "one line of cases" that assertedly permits ICC waiver "only if those state laws pose an *obstacle* to the transaction." Maj. Op. at 17 (emphasis added). No such "line" exists.

The principal case the majority cites for its contention, *Callaway v. Benton*, 336 U.S. 132, 140-41 (1949), set forth the majority's quote in *dicta*. *Callaway* involved a railroad reorganization under § 77 of the Bankruptcy Act, 11 U.S.C. § 205, and under the "narrow facts" there present (336 U.S. at 150), raised the question whether a bankruptcy court could enjoin a state court suit leading to a determination of the requirements of state law with respect to the sale of the entire assets of the lessor railroad. In its limited two paragraph discussion of § 5(11) of the Interstate Commerce Act (now § 11341(a)), the Court expressly rejected any reliance on that section of the Act and, furthermore, distinguished the Bankruptcy Act from the Interstate Commerce Act. *Id.* at 139-40 ("[T]hat section [§ 5(11)] relates to voluntary mergers, not to the purchase of a leased line as part of a plan of reorganization.") ("That power [under § 77] flows from a different source than the power over consolidations under the Interstate Commerce Act."). In its only comment relevant to this case, the Court merely reiterated that nothing in its opinion should be read to derogate its prior opinions upholding the ICC's power "to *override*

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case involved the union's power to strike under the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.*, and the court in fact stated that "section [5(11), now § 11341(a),] relieves the carriers of the restraints and limitations of other *laws*, but it does not, on its face, relieve them from the actions of other parties, i.e., the union's economic threat of a strike." *Id.* at 156 (emphasis added).

state laws interposing obstacles in the path of otherwise lawful plans of reorganization." *Id.* at 140-41 (emphasis added) (footnote omitted).

The remaining cases cited by the majority similarly fail to support the proposition for which they are cited. In *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118 (1948), a South Carolina statute forbade the operation of foreign railroads in that state. The ICC approved a transaction and exempted the railroad from the strictures of the state law. The South Carolina Supreme Court held that the ICC lacked power under § 5 to relieve the carrier from the state law requirements. The Court reversed, explaining:

> . . . Furthermore, since that case [*Texas v. United States*, 292 U.S. 522 (1934)] was decided Congress has given additional proof of its purpose to grant adequate power to the Commission to override state laws which may *interfere with* efficient and economical railroad operation. By § 5(11) of the Interstate Commerce Act, as amended by the Transportation Act of 1940, 54 Stat. 908, 49 U.S.C. § 5(11), Congress granted the Commission "exclusive and plenary" authority in refusing or approving railroad consolidations, mergers, acquisitions, etc. *The breadth of this grant of power can be understood only by reference to § 5(2)(b) which authorizes the Commission to condition its approval upon "such terms and conditions and such modifications as it shall find to be just and reasonable."* All of this power can be exercised in accordance with what the Commission may find to be "consistent with the *public interest.*" The purchaser of railroad property with Commission approval is authorized by § 5(11) "to own and operate any properties . . . acquired through said transaction without invoking any approval under State authority," and such an approved owner, according to that paragraph, is "relieved from the operation of

> *the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved . . .* and to hold, maintain, and *operate* any properties . . . acquired through such transaction."
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> This language very clearly reposes power in the Commission to exempt railroads under a § 5 proceeding from state laws which bar them from operating in the state *or impose conditions upon such operations.*

Id. at 125-26 (emphasis added). Thus, the Court did *not* adopt an "obstacle" standard; rather it articulated the standard as being the "*public interest*" goal of the statute.

The third case cited by the majority, *Texas v. United States*, 292 U.S. 522 (1934), concerned the ICC's approval of a transaction that had exempted a railroad from the prescriptions of a Texas statute which required a railroad operating in the state to maintain offices there. The Commission had found that requiring the railroad in question to maintain such offices would entail "unnecessary" and "burdensome" expenditures and waived compliance therewith. *Id.* at 533. In upholding the ICC the Supreme Court noted:

> Title II of the Emergency Railroad Transportation Act, 1933, in amending § 5 of the Interstate Commerce Act, carries its own provision as to immunity from state requirements which would stand in the way of the execution of the policy of the Congress through the Commission's orders.
>
> . . . .
>
> . . . The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of *economy* and *efficiency* in interstate transportation by the removal of the bur-

> dens of excessive expenditure, the removal of such *burdens* when imposed by state requirements was an essential part of the plan. . . .

Id. at 534. The granting of full trackage rights here is also an essential part of the plan to permit the merger and to compensate—in the public interest—for some of its anticompetitive effects.

Finally, in what can charitably be attributed to oversight, the majority fails to mention in its line of precedent and relegates to a footnote *Schwabacher v. United States*, 334 U.S. 182 (1948), which contradicts the majority's position by stating that the "*public interest*" is the controlling consideration.[5] In *Schwabacher*, the ICC approved, again under § 5(11), the voluntary merger of three railroads. Intervening dissenting shareholders of one of the merging railroads alleged that the terms of the merger would deprive them of charter rights granted by their company's state of incorporation. The Commission, however, disclaimed jurisdiction to pass on the claims of the shareholders and stated that the railroads were free to settle such controversies "through negotiation and litigation in the courts." *Id.* at 188. The Supreme Court reversed. It held that the Commission erred in renouncing its authority to determine finally the rights of the dissenting shareholders, and specifically held that

> . . . *no rights* alleged to have been granted to dissenting stockholders by state law provision concerning liquidation *survive* the merger agreement approved by the requisite number of stockholders and approved by the Commission as just and reasonable.

Id. at 201 (emphasis added). The Court reasoned that it would be "inconsistent to allow state law to apply a liqui-

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[5] *Compare* Callaway v. Benton, 336 U.S. 132, 141 n.10 (1949) ("Seaboard Air Line R. Co. v. Daniel, 333 U.S. 118; *Schwabacher v. United States, 334 U.S. 182*; Texas v. United States, 292 U.S. 522.") (emphasis added), *with* Maj. Op. at 17.

dation basis . . . for continued public service." *Id.* at 200. Regarding the waiver authority, the Court reaffirmed that " 'Congress has long made the maintenance and development of an economical and efficient railroad system a matter of primary national concern. Its legislation must be read with this purpose in mind.' " *Id.* at 193-94 (quoting *Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 124-25 (1948)). The Court noted that "[t]he tenor of all . . . [its prior decisions under the Transportation Act of 1920, 41 Stat. 456] was to confirm the power and duty of the Interstate Commerce Commission, *regardless of state law*, to control rate and capital structures, physical make-up and relations between carriers, in the light of the *public interest* in an efficient national transportation system." *Id.* at 192 (emphasis added). Similarly, "[t]he Transportation Act of 1940 [54 Stat. 908, 49 U.S.C. § 5(11)] . . . authorized approval by the Commission of carrier-initiated, voluntary plans of merger or consolidation if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of *public interest, justice and reasonableness*, in which case they should become effective *regardless of state authority*." *Id.* at 193 (emphasis added) (footnote omitted).[6]

In sum, not only did the Supreme Court *not* adopt the rigorous "obstacle" standard which the majority today requires, the Court envisioned that the legislative purpose was to grant the Commission *greater* authority than the majority suggests to override state laws where needed to approve transactions "consistent with *the public in-*

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[6] The majority's citation to County of Marin v. United States, 356 U.S. 412 (1958) in this discussion is misleading. That case held only that the transaction involved was not within § 5(2)(a) because one party in the acquisition was not a "carrier." The case had nothing to do with the scope of the Commission to approve transactions that *are* within the Commission's jurisdiction or with its waiver authority.

terest" and to ensure that they are "just and reasonable." *Schwabacher*, 334 U.S. at 194-95.

The majority would admonish us that the ICC's exemption authority under section 11341(a) must operate "according to necessity, not according to whim or caprice" and that in exercising this authority, "ICC must do more than shake a wand to make a law go away." Maj. Op. at 16-17. However, in this case it is not the ICC but the majority of the panel which relies on occult powers. For it is the majority who has made the ICC's section 11341(a) exemption authority completely disappear and who has used its opinion to obscure the basis for the ICC's decision to exempt the crew selection process from any protective labor conditions.

There is no dispute here that the approval of the Katy and Rio Grande trackage rights was "necessary" to the approval of the UP-Missouri Pacific-Western Pacific consolidation. The ICC specifically found that the trackage rights were needed to offset the anticompetitive harms created by the consolidation. 366 I.C.C. 459, 566-79. This court has affirmed this aspect of the ICC's decision. *Southern Pacific Transportation v. ICC*, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, 53 U.S.L.W. 3597 (U.S. Feb. 19, 1985). But the ICC did not approve the trackage rights in the abstract; rather, it approved, pursuant to this "necessity" finding, the trackage rights as applied for by the Katy and the Rio Grande.

The ICC cannot bootstrap any exemption to its approval of transactions without justification. But this is far from such a case, since the necessity for the waiver is clear. The whole point of granting the trackage rights applications was to reduce the anticompetitive effects of the consolidation (J.A. 169). Under the ICC's decision the Katy and the Rio Grande will be handling traffic for their own accounts, not for the consolidated UP-Missouri Pacific-Western Pacific (*Id.*). Thus, the trackage rights operations were meant to be conducted *in competition with* the merged UP-Missouri Pacific-Western Pacific opera-

tions, *id.*, and to offset to some extent the monopolistic effects of that enormous consolidation.[7] The majority opinion gives short shrift to these essential reasons for the ICC's decision. To be sure, the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*. It is no surprise the Commission did not feel compelled to spell out specifically such a proposition.

Moreover, the majority's self-styled definition of "trackage rights," upon which the opinion depends, reduces that term to nothing more than a railroad's right only to have its traffic run over another's tracks. *See* Maj. Op. at 7 n.2. The majority *assumes*, with no justification whatsoever, that this cannot include a railroad's right to use its own crews in operating its own trains. This bespeaks an ignorance of what trackage rights might involve and ignores the crew selection provisions that are an integral part of the applications in this case. The majority, in fact, has pulled its definition out of its magic hat. Indeed, even UTU counsel at oral argument conceded that whether a railroad's "trackage rights" include a railroad's right to use its own crews "is really a very generic term subject to subsequent specific negotiations." The sole

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[7] For example, the ICC found that the UP-Missouri Pacific-WP consolidation itself, within the areas where the merged lines overlap, will reduce Missouri Pacific traffic on the Pueblo-Kansas City line by 18.7% in the years following the consummation of the merger. Granting the Rio Grande trackage rights will, as the ICC found, contribute substantially to the economic viability of the Pueblo-Kansas City line. 366 I.C.C. at 572. Moreover, the ICC found that granting the Rio Grande "independent access" to Kansas City through trackage rights would enable it to provide new competitive routes to compensate for the loss of traffic at the Utah gateway which the Rio Grande previously derived from its relations with the WP. *Id.* at 576. Thus, the ICC found a substantial public benefit realized by enhancing and stimulating competition in the central corridor. *Id.* Both the merged lines and the Rio Grande would benefit.

evidence of the meaning of the trackage rights that are here involved is found in the trackage rights applications and the decisions granting them.[8] Those applications stated in express terms that the Katy and Rio Grande would exercise their trackage rights by operating their own trains with their own employees and crews. But rather than at a minimum remanding the record to the ICC for further clarification on this point, the majority *decides* in the teeth of the specific crew provisions themselves that trackage rights in this case do not include a railroad's right to use its own crews, even though such method of operating its trains was specifically applied for and authorized by the ICC. Such action is unseemly, without precedent, and completely unjustifiable.

That the ICC specifically left open for later negotiation between the railroads such terms as trackage compensation is no reason to infer that crew selection, which was specifically covered in the trackage rights applications, was not decided. Approval of crew selection had been expressly requested in the railroad's application for trackage rights, and both applications had been approved. The ICC similarly considered it a "material term" of the trackage rights transaction (J.A. 171), a finding that the majority attempts to disregard. Whether a railroad uses its own crews to operate *its own trains* was not the type of "subsidiary" trackage issue the ICC left open for later negotiation. *See* Maj. Op. at 20-21. To require that Katy and the Rio Grande to submit the issue of crew selection to arbitration could frustrate the trackage rights agreement itself and could destroy one of the essential conditions upon which the ICC approved the merger.

Finally, petitioners cannot now complain that the Commission failed to make a specific finding about the neces-

[8] Other cases have attempted to define "trackage rights." *See, e.g.*, Chicago, Rock Island & Pacific R.R. v. Chicago, Burlington & Quincy R.R., 437 F.2d 6, 10 (7th Cir.) ("Trackage rights" are continuing or permanent easements or licenses granted by one railroad to another railroad), *cert. denied*, 402 U.S. 996 (1971).

sity for the crew selection process when no party, *including the petitioners*, contended during the hearings that granting the pending applications of the Katy and Rio Grande would improperly override existing collective bargaining agreements (J.A. 164, 167). At a minimum, as has been the practice of this court, one would expect the majority under such factual situation to remand the record to the Commission to articulate the majority's required necessity finding.

The majority has thus found itself with the rather absurd result that the Katy and the Rio Grande may not, in the exercise of their trackage rights, use their *own* employees to operate their *own* trains carrying their *own* traffic, for their *own* account, until the railroads have engaged in collective bargaining under the Railway Labor Act with their employees and possibly those of competitor railroads. As one trial judge has already noted in a related proceeding involving many of the same issues as we have here, "Congress did not intend that affected employes have such power to block consolidations which are in the public interest." *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490, 1505 (E.D. Mo. 1984), *appeal pending* (8th Cir.).

In my view, the majority has vacated the ICC's crew provision based on assumptions not supported by the record. It has closed its eyes to the specific pro-competitive purpose that the ICC found would be served by the approval of the trackage rights applications in this case. In doing so, the panel has usurped the statutory authority of the ICC and has substituted its judgment for that of the ICC. I cannot join in such a curtailment of the authority that Congress has granted to the ICC under 49 U.S.C. § 11341(a), and which the ICC exercised to ensure that the consolidation it approved would serve the *"public interest."* 366 I.C.C. at 572, 644. Since this is one of the largest mergers in the history of American railroads, the majority's failure to correctly apply the law here could lead to tremendous nationwide harm. Accordingly, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, ET AL., INTERVENORS

No. 83-2317

UNITED TRANSPORTATION UNION, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, ET AL., INTERVENORS

[Filed May 3, 1985]

Petitions for Review of Orders of the
Interstate Commerce Commission

Before: WRIGHT and MIKVA, Circuit Judges, and MACKINNON, Senior Circuit Judge.

JUDGMENT

These causes came on to be heard on the petitions for review of orders of the Interstate Commerce Commission, and were argued by counsel. On consideration thereof, it is

ORDERED and ADJUDGED, by this Court, that the orders of the Interstate Commerce Commission under review herein are vacated and the cases are remanded for further proceedings consistent with the Opinion for the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: May 3, 1985

Opinion for the Court filed by Circuit Judge Wright.

Dissenting opinion filed by Senior Circuit Judge MacKinnon.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
INTERVENORS

No. 83-2317

UNITED TRANSPORTATION UNION, PETITIONER

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, *et al.*,
INTERVENORS

[Filed July 12, 1985]

Before WRIGHT and MIKVA, Circuit Judges, and MACKINNON, Senior Circuit Judge.

ORDER

It is ORDERED by the court, *sua sponte*, that the opinion for the court filed by Circuit Judge Wright on May 3, 1985, and hereby is, amended as follows:

The fourth full paragraph on page 3 is amended to read:

> Because we find that ICC made no semblance of a showing that the exemption was necessary, as required by the exemption authority section, we vacate the ICC decisions and remand the case to the Commisison for proceedings consistent with this opinion.

The only paragraph of text on page 22 is replaced with the following paragraph:

> We thus vacate the 1983 orders and remand the case to the Commission. The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

Footnote 10 on page 22 is deleted.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
UNION PACIFIC RAILROAD COMPANY, ET AL., INTERVENORS

And Consolidated Case No. 83-2317

[Filed July 19, 1985]

Before: WRIGHT and MIKVA, Circuit Judges, and MACKINNON, Senior Circuit Judge.

ORDER

It is ORDERED, by the Court, *sua sponte*, that the Dissenting Opinion filed by Senior Circuit Judge MacKinnon on May 3, 1985 be, and hereby is, amended as follows:

Page 6, line 10, after "17." insert: "[P]etitioners who delay filing requests for review on their own

assessment of when an issue is ripe for review do so at the risk of finding their claims time-barred." *Id.* at 6.

Page 7, line 7 from the bottom, beginning with the word "Without", strike it and the remainder of said sentence on lines 6, 5 and 4 from the bottom.

Page 9, line 5 of text, after the period following "168)", strike the remainder of said line and all of lines 6, 7 and 8.

Page 19, line 7 of text, strike all of said line and all of line 8 down to and including "point,".

Page 19, line 13 of text, strike everything after the period and all of line 14.

Page 19, line 27 of text, after the word "that" and before the word "Katy," insert: "the" and in line 28 strike the word "to".

Page 20, line 5 of text, strike all of said line after the period following "167)" and strike all of lines 6, 7, 8 and 9.

Per Curiam
For The Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA

And Consolidated Case No. 83-2317

[Filed Aug. 9, 1985]

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges

ORDER

The suggestions for rehearing *en banc* of the various parties have been circulated to the full Court and a majority of the judges in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions for rehearing *en banc* are denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Starr would grant the suggestions for rehearing *en banc*.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 83-2290

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA

And Consolidated Case No. 83-2317

[Filed Aug. 9, 1985]

Before: WRIGHT and MIKVA, Circuit Judges, and MACKINNON, Senior Circuit Judge

ORDER

Upon consideration of the petitions for rehearing of the various parties, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER

Senior Circuit Judge MacKinnon would grant the petitions for rehearing.

APPENDIX F

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY
—TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD
COMPANY—BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY—
TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD
COMPANY—BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: May 12, 1983

[Served: May 18, 1983]

By petition filed April 4, 1983, the Brotherhood of Locomotive Engineers (BLE) seeks clarification of our decision[1] approving the consolidation of the Union Pa-

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[1] *Union Pacific—Control—Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982), embracing Finance Docket No. 30,000 (Sub-No. 18), *Denver and Rio Grande Western Railroad Company—Trackage Rights—Missouri Pacific Railroad Company—Between Pueblo, CO and Kansas City, MO*, and Finance Docket No. 30,000 (Sub-No. 25), *Missouri-Kansas-Texas Railroad Company—Trackage Rights—Missouri Pacific Railroad Company—Between Kansas City, KS and Omaha, NE.*

cific Railroad Company (UP) and Missouri Pacific Railroad Company (MP) (collectively referred to herein as applicants). The Missouri-Kansas-Texas Railroad Company (MKT), the Denver and Rio Grande Western Railroad Company (DRGW), and applicants have filed replies.

BACKGROUND

Pursuant to 49 U.S.C. 11343-4, applicants sought authority to consolidate their railroad systems under the common control of Union Pacific Corporation and Pacific Rail System, Inc., a new railroad holding company.[2] The consolidation decision, served October 20, 1982, which BLE seeks to have clarified, approved the proposed transaction[3] subject to various conditions. These conditions included approval of DRGW and MKT responsive trackage rights applications in the embraced Sub-No. 18 and Sub-No. 25 proceedings, respectively. The approved trackage rights authorize DRGW to operate over MP's line between Pueblo, CO, and Kansas City, MO, and authorize MKT to operate over MP's line between Kansas City, KS and Omaha, NE. Approval of the consolidation was conditioned upon the grant of these trackage rights in order to protect the public interest from potential anticompetitive harms.

POSITIONS OF THE PARTIES

BLE: BLE seeks to have the consolidation decision clarified with respect to whether MKT and DRGW may use their own operating crews in performing trackage rights operations over MP lines. It asserts that this Commission has no jurisdiction over crew assignment matters and that our decision should not be construed

[2] In another application, handled on a consolidated basis, UP sought authority to acquire control of Western Pacific Railroad Company.

[3] The consolidation was subsequently consummated on December 22, 1982.

as authorizing MKT or DRGW to use their own crews in the performance of the approved operations. It indicates that these matters are subject to settlement in accordance with the Railway Labor Act and are not within the scope of our decision approving the responsive trackage rights applications.

MKT: MKT asserts that the consolidation decision clearly and correctly authorizes it to conduct trackage rights operations using its own crews. MKT's operating plan submitted as part of its trackage rights application specified that the operations would be conducted using MKT crews. The application was approved without restrictions on the proposed operating plan. MKT notes that we have very broad conditioning powers under 49 U.S.C. 11343 in consolidation proceedings and that our jurisdiction over consolidations, and the terms and conditions thereof, is plenary under 49 U.S.C. 11341.

DRGW: DRGW contends that our later decisions in these proceedings, served November 24, 1982, and January 18, 1983, regarding DRGW trackage rights operations clearly and unambiguously state that DRGW has been authorized to conduct operations over MP lines using its own crews. Therefore, DRGW considers this issue to be moot with respect to its operations.

Applicants: Applicants argue that the consolidation clearly authorized MKT and DRGW to operate using their own crews. The trackage rights applications specified that the trackage rights tenants would use their own crews and no party opposed that aspect of the plans during the course of these proceedings. Approval of the applications, including the operating plans, they state, is within our jurisdiction.

DISCUSSION AND CONCLUSIONS

The consolidation decision does not require clarification. We approved the responsive trackage rights appli-

cations of DRGW and MKT in Sub-No. 18 and Sub-No. 25 subject only to applicable employee protective conditions and the requirement that the parties negotiate compensation for use of the MP lines (or request us to set compensation in the event of an impasse). Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations. Our decisions of November 24, 1982, and January 18, 1983, unambiguously specified that trackage rights tenants may perform operations using their own crews.[4]

BLE has presented no argument or evidence setting forth any issue in need of clarification. Rather, BLE is attempting to reargue an issue that has already been decided. Its petition does not present any facts, however, that warrant reopening these proceedings for reconsideration. We have broad authority to impose conditions on consolidations and our jurisdiction is plenary. Therefore, we properly authorized performance of trackage rights tenants using their own crews. The petition will be denied.

This action will not significantly affect the quality of the human environment or energy conservation.

It is ordered:

1. The petition of BLE for clarification is denied.
2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

(SEAL)

AGATHA L. MERGENOVICH
Secretary

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[4] This includes current employees of MKT and DRGW as well as any new employees they may hire of their own free will (including MP employees).

APPENDIX G

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30,000 (Sub-No. 18)

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY —TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN PUEBLO, CO AND KANSAS CITY, MO

Finance Docket No. 30,000 (Sub-No. 25)

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY— TRACKAGE RIGHTS—MISSOURI PACIFIC RAILROAD COMPANY—BETWEEN KANSAS CITY, KS AND OMAHA, NE

PETITION FOR CLARIFICATION

Decided: October 19, 1983

[Served: October 25, 1983]

By petition filed May 31, 1983, the Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU) seek reconsideration of our decision served May 18, 1983, denying BLE's petition for clarification in these proceedings. Replies have been filed by Missouri-Kansas-Texas Railroad Company (MKT), Denver and Rio Grande Western Railroad Company (DRGW), and jointly by Union Pacific Railroad Company (UP) and Missouri Pacific Railroad Company (MP). UTU has petitioned for leave to file a reply to the replies.

PROCEDURAL MATTER

Our Rules of Practice do not permit a reply to a reply, 49 C.F.R. 1104.13(c). UTU, however, contends that its tendered reply is necessary for a clear presentation of the issues. As the reply does not broaden the scope of UTU's petition, we will accept the reply for filing so that we may fully address the issues.

BACKGROUND

By decision served October 20, 1982, the Commission approved the consolidation of UP and MP under the common control of Union Pacific Corporation and Pacific Rail System, Inc. *Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 459 (1982). Several railroads, including DRGW and MKT, opposed the consolidation and filed responsive applications for the imposition of trackage rights conditions. BLE, UTU, and various other railway labor organizations opposed the consolidation and actively participated in the consolidation and responsive trackage rights applications proceedings.

As conditions to approval of the consolidation we approved DRGW's application for trackage rights over MP's line between Pueblo, CO and Kansas City, MO and MKT's applications for trackage rights over UP and MP lines extending between Kansas City, KS, Topeka, KS, Omaha, NE, and Lincoln, NE. Pursuant to 49 U.S.C. 11343-4, we approved the proposed trackage rights agreements submitted by DRGW and MKT in their responsive applications, subject to determination of fair compensation for use of the trackage rights and further subject to our usual employee protective conditions.[1] DRGW's proposed agreement specified that DRGW could, at its option, perform trackage rights operations using its own

[1] *Norfolk and Western Ry. Co.—Trackage Rights-BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.-Lease and Operate*, 360 I.C.C. 653, 664 (1980) (*NW-BN* conditions).

crews. MKT, pursuant to its proposed agreement, would use its own crews in performing its operations.

After consummation of the consolidation, DRGW and MKT began performing the approved trackage rights operations. A dispute then arose between the involved railroads and BLE over whether the trackage rights tenants could perform operations over MP's lines using their own crews without the consent of the unions representing MP's employees. BLE's petition for clarification sought a decision stating that this Commission has no jurisdiction over these crew assignment disputes and that the consolidation decision and approval of trackage rights did not authorize DRGW and MKT to operate over MP lines using their own crews. BLE and UTU now seek reconsideration of our decision denying that request for relief.

In its petition for reconsideration, BLE contends that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act (RLA) 45 U.S.C. 151, *et seq.* BLE further asserts that trackage rights operations by DRGW and MKT using their own crews constitute a unilateral change in working conditions by MP in violation of the labor protective conditions imposed on the consolidation.[2]

UTU argues that the Commission's plenary jurisdiction over railroad consolidations does not authorize us to immunize a transaction from the requirements of the RLA or to approve unilateral changes of collective bargaining agreements. UTU states in the alternative that if the Commission has jurisdiction it failed to make necessary findings supporting overriding the RLA or showing how the policies of the RLA were accommodated with those of the Interstate Commerce Act.

[2] The consolidation is subject to the usual labor protective conditions as set forth in *New York Dock Ry.-Control-Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979) (*New York Dock* conditions).

In their replies, DRGW, MKT, and UP-MP assert that the arguments of BLE and UTU are legally incorrect, that petitioners have failed to satisfy the procedural requirements for reopening a proceeding, and that the allegations of violations of the RLA and collective bargaining agreements were not raised during the course of the proceedings on the consolidation and the responsive trackage rights applications.

UTU, in its response to the railroads' pleadings, makes further arguments regarding purported violations of the RLA, collective bargaining agreements, and the *New York Dock* conditions. It asserts that the trackage rights operations involve work which, by custom, is to be performed by MP employees. Thus, operations using the tenants' crews are unauthorized transfers of the work in violation of the RLA. It further states that only the Federal Courts have jurisdiction to determine whether an agreement violates the RLA. UTU also argues that we did not, and could not, determine that MP employees have no right to participate in the trackage rights crew selection process. It contends that such a determination would deprive MP employees of property rights without due process and would violate the requirements of 49 U.S.C. 11347 and of the *NW-BN* and *New York Dock* conditions.

DISCUSSION AND CONCLUSIONS

The various arguments of BLE and UTU are all based essentially on the assertion that the proposed trackage rights operations which we have approved involve UP-MP unilaterally changing the working conditions of their employees by transferring work which, by custom and under collective bargaining agreements, is to be performed by UP-MP employees. This purported change, petitioners argue, violates the RLA and the *New York Dock* and *NW-BN* conditions. Petitioners contend that UP-MP employees, through their bargaining agents, have

the right to participate in the trackage rights crew selection process and have the right to have any related disputes resolved pursuant to the RLA and the applicable labor protective conditions. We find these arguments to be unpersuasive and unsupported by the record in these proceedings.

Jurisdiction. Although we conclude that the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements, we will address UTU's argument that we lack jurisdiction under 49 U.S.C. 11341, to exempt a transaction from the requirements of the RLA.

The Commission's jurisdiction over railroad consolidations and trackage rights transactions, within the scope of 49 U.S.C. 11343, is exclusive. Our approval exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied* 375 U.S. 819 (1963).

Contrary to UTU's arguments, the 4-R Act[3] did not limit our authority to exempt a transaction from the RLA. Rather, the 4-R Act specified standards for the minimum level of employee protection to be imposed as conditions to the approval of certain transactions. Those standards, however, do not require preserving rights under the RLA. Affected carrier employees have rights to the extent specified in the protective conditions imposed pursuant to 49 U.S.C. 11347.

As UTU notes, standard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying

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[3] Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976).

statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction. The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Employees adversely affected by the transaction may receive benefits under the protective conditions and under pre-existing agreements to the extent those benefits are not pyramided. If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in *Brotherhood of Loc. Eng.*, *supra*, at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act.

Supporting Findings. Petitioners argue that even if the Commission has jurisdiction to exempt the transactions from the RLA, we failed to do so in this proceeding. Further, they argue that we have not atempted to reconcile the decision with the policies of the RLA nor made any findings supporting an exemption from the RLA.

The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints. *See Brotherhood of Loc. Eng. supra, citing Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, at 432 (1958).

In evaluating a transaction under the criteria of 49 U.S.C. 11344, we must consider the policies of statutes other than the Interstate Commerce Act to the extent that those policies are relevant to the determination of

whether a proposal is consistent with the public interest. For example, the public interest evaluation must include consideration of the policies of the antitrust laws. *See McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87 (1944).

While the RLA, like the antitrust laws, embodies certain public policy considerations, the Interstate Commerce Act also specifies that the interests of affected employees must be considered. In these proceedings we gave full consideration to the impact of the consolidation on railroad employees in accordance with our established policies. 366 I.C.C. 618-22.

The record in these proceedings is devoid of any suggestion by BLE, UTU, or any other party that the approval of the responsive trackage rights applications, subject to the usual labor protective conditions, would be in any way inconsistent with the policies of the RLA. In these circumstances, we can find no merit in UTU's argument that we improperly failed to reconcile the policies of the RLA with our decision.

Labor Conditions. Petitioners contend that operations by the trackage rights tenants, using their own crews, over UP-MP lines would constitute a unilateral change in working conditions for UP-MP employees in violation of the *NW-BN* and *New York Dock* conditions. They further contend that these crew assignment disputes are labor issues in which the Commission should not be involved. As previously discussed, the standard labor conditions do not freeze working conditions which must be altered to implement an approved transaction. The record in these proceedings strongly supports the conclusion that the approved trackage rights operations are not inconsistent with the terms of any collective bargaining agreements or of the imposed labor conditions.

BLE, UTU, and various other railway labor organizations participated in these proceedings, and none made any argument or presented any evidence that the respon-

sive trackage rights proposals would violate any applicable labor agreements. Rather, the record supports the conclusion that the trackage rights operations, using the tenants' crews, could be implemented as approved without raising any dispute over crew assignments between the employees of different railroads.

The responsive trackage rights applications in these proceedings were filed in January 1981, and in accordance with regulations, included proposed trackage rights agreements which specified the operating conditions for the trackage rights. The agreement in MKT's application specified: "MKT, with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed agreement Section 5, MKT trackage rights application, Finance Docket No. 30,000 (Sub-No. 25) (MKT-25). DRGW's application provided: "Rio Grande may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track . . . ." Proposed agreement Section 6(c)(3), DRGW trackage rights application, Finance Docket No. 30,000 (Sub-No. 18) (DRGW-8). Therefore, in January 1981, over a month before the commencement of hearings, all parties had notice that the responsive trackage rights applicants sought authority to perform operations using their own crews.

On February 20, 1981, DRGW and MKT filed their verified statements in support of their responsive applications. These statements further make clear the position of those carriers that, if their applications were approved, they would have the right to conduct trackage rights operations using their own crews. For example, DRGW's evidence stated: "If our trackage rights applications are granted, both over WP [4] and MP, we anticipate that a fewer number of employees will be dis-

[4] The application for trackage rights over the Western Pacific Railroad Company was subsequently withdrawn.

placed, or a reduction of 176 jobs as opposed to 350 jobs if these applications are not granted." Verified Statement of A. H. Nance, at 15. MKT's evidence stated: "The projected position impacts shown on Exhibit 4 [to the trackage rights applications] reflect our determination of the number of positions that would be created, eliminated or transferred, or the other affects of such actions due to the acquisition of trackage rights. Our determinations were based primarily on the essential provisions of the applicable labor agreements and consultation with other carrier officers." Verified Statement of Harold M. Hacker, at 2. These verified statements clearly demonstrate the intent of MKT and DRGW to operate using their own crews. The assessments of labor impacts make no mention of any possibility of UP-MP employees having any right to perform the proposed operations.

During the course of hearings in these proceedings, DRGW and MKT witnesses Nance and Hacker were cross-examined on the testimony in their verified statements. No labor party cross-examined Mr. Hacker. *See* Transcript, Finance Docket No. 30,000, Bifurcated Hearing, June 23, 1981, at 3398-3417. Thus, Mr. Hacker's testimony regarding labor impact on MKT employees as a result of approval of the proposed trackage rights operations stands in the record without qualification.

Mr. Nance was cross-examined by various parties, including UTU. Under cross-examination by counsel for UP-MP, Mr. Nance testified that DRGW was willing to negotiate with UP-MP regarding whose crews would perform operations. Transcript, Finance Docket No. 30,000, June 23, 1981, at 8432-3. He testified that "as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want," at 8433, *also see* at 8449-50. Mr. Nance's testimony clearly states that the decision whether to use UP-MP or DRGW crews would be a matter solely within

the discretion of the managements of the railroads. At no point does he indicate that UP-MP employees would have any right to participate in the decision-making process.

Following cross-examination by applicants, the labor parties had the opportunity to cross-examine Mr. Nance. BLE did not question him. Counsel for UTU's cross-examination dealt exclusively with Mr. Nance's projection of the impact of the primary transactions on DRGW's employees. No questions were asked regarding DRGW's assessment of the labor impacts of its sought responsive trackage rights. Transcript at 8555-8.

BLE and UTU submitted evidence and presented witnesses in opposition to the responsive trackage rights applications. Nowhere in these evidentiary presentations did the labor parties indicate that UP-MP employees would have a right to participate in the selection of which railroad's crews would perform trackage rights operations.

On July 3, 1981, BLE submitted the verified statement of Edmund G. Becker in opposition to trackage rights over UP lines. Prepared Statement BLE-1, entered into evidence as BLE-H(VS)-2. Mr. Becker noted that the trackage rights applicants intended to perform operations using their own crews. He testified that granting the responsive applications "would have an adverse effect on the engineers currently handling the traffic received from and delivered to the Missouri-Kansas-Texas Railroad at Kansas City [and] . . . it would be safe to say that no less than two hundred-sixty (260) engineers would be affected due to the ripple effect . . . ." BLE-H (VS) 2, at 4. The verified statement does not suggest that UP engineers would have any protection from these adverse consequences under any collective bargaining agreements or the RLA. Further, on cross-examination, Mr. Becker did not indicate that UP engineers would have any right to participate in trackage rights work force selection. Rather, he testified that UP engineers

would be adversely affected by approval of the responsive applications. Transcript, at 12,974-81, September 16, 1981.

On August 31, 1981, the parties identified as Various Labor Organizations, including UTU, submitted verified statements (VLO-H(VS)-2). Representatives of UTU provided verified statements included in VLO-H(VS)-2. None of those statements, however, contain testimony supporting the assertion that UP-MP employees would have any right to participate in the trackage rights crew selection process.

Finally, in their post-hearing briefs neither UTU nor BLE made any arguments or cite any evidence in support of the positions they now advocate. The brief for Various Labor Organizations, in its statement of facts, cites Mr. Nance's testimony regarding labor impact of the consolidation, with and without approval of DRGW's trackage rights application. Thus, the brief filed on behalf of UTU accepts labor impact evidence which assumes that trackage rights operations would be performed by the tenant using its own crews. BLE's brief does not discuss the labor impacts of the responsive trackage rights. Rather, it merely made reference to BLE-H (VS)-2 on that point. Thus, the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process.

Further, petitioners' argument regarding the alleged unilateral change of working conditions mischaracterizes the nature of the trackage rights operations. BLE and UTU have cited decisions such as *St. Louis Southwestern Ry. Co.* v. *Broth. of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981) for the proposition that railroads cannot transfer or contract out work which, under collective bargaining agreements and by custom, is to be done by their own employees. These decisions are not relevant with respect to the trackage rights crew assignments in

issue here. We approved the MKT and DRGW trackage rights applications to ameliorate certain anticompetitive impacts of the UP-MP consolidation. Those trackage rights operations will be conducted in competition with UP-MP operations. MKT and DRGW will be handling traffic for their own accounts not for UP-MP. UP-MP has not transferred or contracted out any work by agreeing to the trackage rights as a condition to the consolidation.

BLE and UTU both contend that our decision denying BLE's petition for clarification is inconsistent with our general policy of not injecting the Commission into labor disputes. In support, petitioners cite Finance Docket No. 28046, *Illinois Central Gulf R. Co.-Trackage Rights-Over Chicago & I.M. Ry. Co.* (not printed), served February 22, 1977 and Finance Docket No. 30138, *Cairo Terminal Railroad Co.-Trackage Rights Exemption-Illinois C.G. R. Co.* (not printed), served May 17, 1983.

In *Illinois Central Gulf*, the Commission approved a trackage rights agreement which included a provision that the trackage rights tenant would perform operations using its own crews. UTU filed a petition for reconsideration asserting that the Commission had no authority to impose a crew assignment condition and requesting that the condition be removed. The Commission, Division 3, dismissed the petition for reconsideration finding that the crew assignment provision of the agreement was not a condition imposed by the Commission pursuant to the section of the Interstate Commerce Act now codified as 49 U.S.C. 11347. Rather, the provision was a negotiated agreement between the railroads. The provision was approved (and thus immunized it from all other laws) because it would have no adverse transportation effects. The Division noted that the Review Board, in approving the trackage rights, declined jurisdiction over all *other* subject matters and the Division concluded that the Commission has no jurisdiction to impose or to remove crew assignment provisions.

UTU and BLE ask us for the same relief the Commission denied in *Illinois Central Gulf*. The Commission has the power to approve (and to immunize from other laws) crew assignment provisions in trackage rights agreements. These provisions are not labor conditions and cannot be removed or modified in the manner applicable to labor conditions.

In *Cairo Terminal*, the involved railroads sought an exemption for a proposed trackage rights agreement. The agreement contained a provision regarding which carrier's employees would perform the trackage rights operations. UTU protested the exemption request and requested that the Commission expressly disclaim jurisdiction over the crew assignment provision. UTU's argument was not considered because the Commission's action in that proceeding was based on 49 U.S.C. 10505, not on 49 U.S.C. 11344 relating to approval of trackage rights agreements. The decision noted, however, that "Crew assignment provisions in trackage rights agreements are within this Commission's subject matter jurisdiction to the extent they relate to the transportation effects of the proposed transaction." Slip op., at 8.

Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other law to the extent necessary to permit implementation of the agreement. To the extent employees are adversely affected by the transaction they are entitled to benefits under the conditions imposed pursuant to 49 U.S.C. 11347.

Provisions of trackage rights agreements designating which carrier's employees will perform trackage rights operations are material terms of the agreement and may be implemented without any other approval. Further, the agreement is exempted from any requirements of law that could frustrate implementation of the trackage

rights agreement as approved, including the crew assignment provision.

This action will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The petitions of BLE and UTU for reconsideration are denied.

2. This decision shall be effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Sterrett, Commissioners Andre and Gradison.

AGATHA L. MERGENOVICH
Secretary

[SEAL]

APPENDIX H

STATUTES INVOLVED

Section 11341, Title 49, United States Code provides that:

Scope of authority

(a) The authority of the Interstate Commerce Commission under this subchapter is exclusive. A carrier or corporation participating in or resulting from a transaction approved by or exempted by the Commission under this subchapter may carry out the transaction, own and operate property, and exercise control or franchises acquired through the transaction without the approval of a State authority. A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction. However, if a purchase and sale, a lease, or a corporate consolidation or merger is involved in the transaction, the carrier or corporation may carry out the transaction only with the assent of a majority, or the number required under applicable State law, of the votes of the holders of the capital stock of that corporation entitled to vote. The vote must occur at a regular meeting, or special meeting called for that purpose, of those stockholders and the notice of the meeting must indicate its purpose.

(b) A power granted under this subchapter to a carrier or corporation is in addition to and changes its powers under its corporate charter and under State law. Action under this subchapter does not establish or provide for establishing a corporation under the laws of the United States.

Section 11343, Title 49, United States Code provides that:

Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under

this subchapter. In addition to other transactions, each of the following transactions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d)(1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a

carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e) (1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under

this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person, class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

Section 11344, Title 49, United States Code provides that:

Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission

under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b) (1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the

transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or

proposal developed under section 333(a)-(d) of this title, accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

Section 11347, Title 49, United States Code provides that:

> Employee protective arrangements in transactions involving rail carriers
>
> When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate

> Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565). Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

Section 156, Title 45, United States Code provides that:

> Procedure in changing rates of pay, rules and working conditions
>
> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier

until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board:

Section 157, Title 45, United States Code provides that:

Arbitration

First. Submission of controversy to arbitration

Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however*, That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

Second. Manner of selecting board of arbitration

Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first

meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. Board of arbitration; organization; compensation; procedure

(a) Notice of selection or failure to select arbitrators

When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board; and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this chapter, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or to complete such selection.

(b) Organization of board; procedure

The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however*, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representative as they may respectively elect.

(c) Duty to reconvene; questions considered

Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) Competency of arbitrators

No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Compensation and expenses

Each member of any board of arbitration created under the provisions of this chapter named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) Award; disposition of original and copies

The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Interstate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, under subtitle IV of title 49.

(g) Compensation of assistants to board of arbitration; expenses; quarters

A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) Testimony before board; oaths; attendance of witnesses; production of documents; subpoenas; fees

All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he is, authorized, and it shall be his duty, to issue such subpoenas.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

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Nos. 85-792, 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS AND
UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF PETITIONS

JAMES V. DOLAN
PAUL A. CONLEY, JR.
1416 Dodge Street
Omaha, NE 68179

CHARLES A. MILLER
GREGG H. LEVY*
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Railroad Company and
Missouri Pacific Railroad Company

November 1985

*Counsel of Record

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BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY IN SUPPORT OF PETITIONS

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company (collectively "UP/MP"), intervenors in the court below, submit this brief in support of the petitions for certiorari filed by the Interstate Commerce Commission and the Missouri-Kansas-Texas Railroad Company ("MKT").

Union Pacific and Missouri Pacific support the petitions notwithstanding the fact that their interests in this dispute appear to conflict with those of petitioner MKT. UP/MP are the "landlords" of the trackage rights at issue below; the relief sought by the unions would allow UP/MP employees to

participate in the selection of crews to operate the trains of UP/MP's tenant and competitor, MKT. As Judge MacKinnon recognized below (MKT Pet., A32-33), affording one railroad's employees a right to participate in selecting the crews to operate its competitors' trains would be not only unprecedented, but it would also create significant competitive and labor problems in the railroad industry. For that reason, UP/MP have supported MKT's position throughout these proceedings.

The chaos and confusion caused by the decision below is illustrated by the unions' threat to strike Missouri Pacific because of MKT's decision to exclude UP/MP employees from the process of selecting crews to operate MKT's trains. See *generally Missouri Pacific Railroad Co.* v. *United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984), *appeal pending*, No. 84-1465 (8th Cir.). The unions' strike notice, which purported to be based on rights afforded by the Railway Labor Act, threatened to abrogate the public interest benefits of a transaction approved by the ICC under the Interstate Commerce Act, as well as the public interest in maintaining the uninterrupted flow of interstate commerce.

Such public interest concerns and considerations surely shaped Congress' intent in enacting the Interstate Commerce Act, the language and legislative history of which make unambiguously clear that transactions approved by the ICC are exempt "from all other law . . . necessary to let that person carry out the transaction . . . . " 49 U.S.C. § 11341(a). Recognition of that unambiguous statutory language—and of its application to the Railway Labor Act—is reflected in decisions of the Sixth and Eighth Circuit Courts of Appeals, with which the decision below squarely conflicts. See *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Railway*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963); *Nemitz* v. *Norfolk & Western Railway*, 436 F.2d 841 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971).

To resolve the conflict among the Circuits created by the decision below, and to prevent the regulatory confusion and industry chaos that the D.C. Circuit Court's decision would entail, this Court should grant the ICC and MKT petitions.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petitions of the Interstate Commerce Commission and the Missouri-Kansas-Texas Railroad Company, we respectfully urge the Court to issue the requested writ of certiorari to review the decision of the D.C. Circuit below.

Respectfully submitted,

JAMES V. DOLAN
PAUL A. CONLEY, JR.
1416 Dodge Street
Omaha, NE 68179

CHARLES A. MILLER
GREGG H. LEVY*
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Railroad Company and
Missouri Pacific Railroad Company

November 1985

*Counsel of Record

APPENDIX

Set forth below, pursuant to Rule 28.1, is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company:

The Alton & Southern Railway Company
Arkansas & Memphis Railway Bridge and Terminal Company
The Belt Railway Company of Chicago
Brownsville & Matamoros Bridge Company
Camas Prairie Railroad Company
Chicago and Western Indiana Railroad Company
The Denver Union Terminal Railway Company
Galveston, Houston and Henderson Railway Company
Great Southwest Railroad, Inc.
Houston Belt & Terminal Railway Company
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
St. Joseph Terminal Railroad Company
Southern Illinois and Missouri Bridge Company
Terminal Industrial Land Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
Trailer Train Company

(4) (3)

Nos. 85-792 and 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONS

HARRY LUSTGARTEN
6548 Country Squire Lane
Omaha, Nebraska 68152
(402) 571-1265

RICHARD T. CONWAY
(Counsel of Record)
WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

KENNETH P. KOLSON
Association of
American Railroads
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2100

DAVID P. LEE
General Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

Counsel for Amici Curiae

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONS

INTEREST OF *AMICI CURIAE*

The Association of American Railroads is the trade association for the nation's railroads. Its members employ approximately 94% of the workers, operate approximately 92% of the trackage, and account for approximately 97% of the freight revenues of all railroads in the United States. The Association represents its member railroads before courts, agencies, and the U.S. Congress when matters of common concern are at issue.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearing house of information regarding, and renders assistance and advice to member railroads concerning, employee protection issues that arise out of mergers and other railroad transactions governed by the Interstate Commerce Act.

This case raises the question whether disputes arising out of rail carrier efforts to implement transactions approved by the Interstate Commerce Commission are to be resolved according to the procedures prescribed by the Interstate Commerce Act, or the procedures prescribed by the Railway Labor Act. The difference between the two Acts on this score is critical. Under the Interstate Commerce Act such disputes are resolved promptly by mandatory, binding arbitration; under the Railway Labor Act they may lead to strikes and other forms of self-help, interfering with interstate commerce and possibly blocking altogether the realization of transactions held to be in the public interest.

The decision of the court of appeals in this case misconstrues the relationship between the two statutes and threatens serious interference with and delay to the ability of railroads to implement not only Commission-approved trackage rights transactions, which is the subject of this case, but also mergers and consolidations that have already been approved or may in the future be approved. As we show below, there is no more important labor relations issue in the railroad industry today than the one involved in this case. The AAR and the NRLC accordingly file this brief in support of a grant of cer-

tiorari.[1] We understand that the unions involved herein, the United Transportation Union and the Brotherhood of Locomotive Engineers, will also seek certiorari, and that one or both of them has been authorized to state that the Railway Labor Executives' Association, which consists of the presidents of all of the major rail unions, supports their efforts in that regard. In short, the industry is united in seeking review so that this Court may determine the proper relationship between the Interstate Commerce Act and the Railway Labor Act in disputes over the implementation of ICC-approved transactions.

STATEMENT

1. The Statutory Framework.

a. The Interstate Commerce Act requires the approval of the Commission before rail carriers can take certain actions or engage in certain transactions, such as rail abandonments (49 U.S.C. § 10903), mergers and consolidations, and acquisitions of trackage rights over another carrier's line. § 11343. With respect to transactions subject to § 11343, the Commission's jurisdiction is "exclusive," and carriers participating in approved transactions are "exempt * * * from all other laws * * * as necessary to let that person carry out the transaction * * *." § 11341(a). In determining whether to grant an application subject to § 11343, the Commission is required to consider, among other things, "the interest of carrier employees affected by the proposed transaction," § 11344(b)(1)(D), and if it approves the application the Commission "shall require the carrier to provide a fair arrangement" to protect employees adversely affected by the transaction. § 11347.

In a series of decisions, the Commission has established the protections to be afforded employees adversely af-

[1] Written consents from all parties to the filing of this brief have been filed with the Clerk of the Court.

fected as a result of approved rail abandonments,[2] mergers and consolidations and common control transactions,[3] and lease and trackage rights transactions.[4] Under these decisions, an employee who is dismissed from his job or displaced to a lower paying position as a result of the approved transaction will continue to receive, generally for six years, the equivalent of the wage he was earning at the time of the adverse effect; employees must accept available work in order to preserve their protected status; moving expenses are provided if relocation is necessary; transfers of work are subject to "implementing agreement" provisions regarding the allocation of seniority or other rights of affected employees; and arbitration of disputes arising out of carrier efforts to implement approved transactions is mandatory if the carrier and the union representing affected employees do not voluntarily enter into an implementing agreement. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 94.

b. Efforts to change collective bargaining agreements in the railroad (and airline) industry give rise to so-called "major disputes" under the Railway Labor Act. *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Because the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes,'" *Texas and New Orleans R.R.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 565 (1930), the Act requires the parties to such a dispute to follow certain prescribed procedures designed to maximize the possibility of reaching agreement. Those procedures are "purposely long and drawn

[2] *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91, 98-102 (1979).

[3] *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), *enforced*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).

[4] *Norfolk and Western Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980).

out," *Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and their exhaustion is "almost an interminable process." *Detroit and Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969).[5] At their ultimate conclusion, however, the parties may resort to self-help, including a strike by a union if its demands have not been met. *E.g.*, *Railway Clerks* v. *Florida East Coast Ry.*, *supra*, 384 U.S. at 243-44.

2. The Decisions Below.

In the proceeding below, in order to ameliorate the anticompetitive effect of the merger of the Union Pacific ("UP") and Missouri Pacific ("MP") railroads, the Commission granted two competing carriers—the Missouri-Kansas-Texas ("MKT") and the Denver and Rio Grande Western ("DRGW")—rights to operate their trains over tracks owned by MP. The trackage rights applications submitted to and approved by the Commission stated that the MKT would use its own employees to man its trains, and that the DRGW would have the

[5] In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described the Act's "detailed framework to facilitate the voluntary settlement of major disputes":

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10."

option of doing so. (Pet. App. 62a.)[6] When the tenant carriers exercised the trackage rights authority granted by the Commission, the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") protested to the Commission on behalf of the MP employees.[7] They argued that the tenants' use of their own crews amounted to a change in the collective bargaining agreements relating to the working conditions of MP employees; that such a change could be lawfully effected only pursuant to collective bargaining under the RLA; that the Commission has no power under the Interstate Commerce Act to authorize a transaction effecting such a change without resort to the procedures of the RLA; and that if the Commission did have such power it had not adequately explained the reasons for exercising it. (Pet. App. 57a-59a).[8]

The Commission rejected the unions' arguments. It reviewed the record and found that "the approved trackage rights operations" whereby the tenants use their own crews "are not inconsistent with the terms of any collective bargaining agreements * * *." (Pet. App. 61a.) It also concluded that, in any event, the tenants

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[6] "Pet. App." references are to the appendix to the petition of the Interstate Commerce Commission.

[7] Both the BLE and the UTU participated in the initial ICC proceeding, opposing the trackage rights transactions generally and requesting imposition of labor protections; but neither opposed the applications insofar as they would allow the tenants to use their own crews and neither objected on appeal to the approval of that aspect of the applications.

[8] In addition, the UTU threatened to strike the MP unless the MP refused to permit MKT crews to operate MKT trains on MP tracks. That threatened strike was enjoined by the District Court for the Eastern District of Missouri. *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *pdg. on appeal*, No. 84-1465 (8th Cir.).

were free to use their own crews because, even if that did amount to a change in the working conditions of MP employees, the RLA provisions did not apply for the reasons stated at length in *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963). (Pet. App. 60a.)

Over a dissent by Judge MacKinnon, the court of appeals found the Commission's explanation inadequate. It vacated the Commission's orders on the asserted ground that the agency "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a; footnote omitted.)

ARGUMENT

We show below that the court of appeals was wrong in concluding that the Commission did not adequately explain the reasons for its conclusions; that the decision below creates a conflict among the circuits; and that certiorari is warranted in the interest of the orderly administration of justice in the federal courts and to resolve the uncertainty in the rail industry over the role, if any, of the Railway Labor Act in disputes arising from carrier efforts to implement transactions approved by the Commission as being in the public interest.

A. The Commission Adequately Explained Itself.

The Commission's reasoning in its October 19, 1983 decision "may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). It set out the issues for decision by stating the unions' claims: "that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act" and that the Commission's approval of the trackage rights transaction could not "immunize [that]

transaction from the requirements of the RLA" or authorize the carriers to make "unilateral changes of collective bargaining agreements." (Pet. App. 57a.) The Commission then went on to reject those arguments, ruling that its approval of a transaction covered by § 11343—

> "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963)." (Pet. App. 59a.)

It also ruled (*id.* 60a):

> "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

And then the Commission explained why (*id.*):

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to congressional intent. The discussion of this point in *Brotherhood of Loc. Eng.* [v. *Chicago and North Western Ry. Co.*], *supra*, at 430-1, is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act."

The Commission's two citations to the Eighth Circuit's decision in the *Chicago and North Western* case (hereinafter *"BLE* v. *CNW"*), and its adoption of the reasoning there as its own, provide a fully adequate basis for its finding that the crew selection provisions of the approved

trackage rights agreements were exempt from the provisions of the RLA.[9] In that case the defendant carrier had, with the Commission's approval, purchased the properties and operating rights of another carrier, subject to employee protections imposed by the Commission. When the carrier sought to implement the transaction the unions objected, arguing that resort to the RLA major dispute procedures was required. But the court ruled that the RLA had been superseded by the Interstate Commerce Act for purposes of implementing the approved transaction. The court relied, among other things, on the legislative history of the Transportation Act of 1940, which was the source of congressionally imposed employee protective conditions and which amended the Interstate Commerce Act to provide for such protections. In passing that Act Congress rejected a proposed amendment—the "Harrington" amendment—that would have forbidden carriers from abolishing jobs or impairing existing employment rights as a result of a merger or other transaction needing the Commission's approval under § 11343. That amendment, the Eighth Circuit noted, "'threatened to prevent all consolidations to which it related.'" *Id.* at 430 (quoting *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142, 151 (1950)). Its defeat fortified the conclusion that Congress intended the ICC-prescribed protective conditions rather than the RLA to govern the adjustments caused by merger implementations, for if the RLA were to govern it would allow the nullification of Commission-approved transactions:

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[9] See *Shepard* v. *NLRB*, 459 U.S. 344, 348-52 (1983), in which this Court upheld the Board's decision to forgo a requirement of reimbursement as a remedy for violation of § 8(e) of the National Labor Relations Act. The Board's reasoning on that issue was confined to a footnote and was "something less than a model of precise expository prose," but the Court was able to glean "the sense of the Board's explanation," in part by a reading of a decision that the Board had merely cited in the explanatory footnote. *Id.* 350.

> "[T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. * * * Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations." *Id.* at 430-31.

The Eighth Circuit accordingly concluded that the Railway Labor Act was one of the laws from which carrier participants in ICC-approved transactions are exempt under § 11341(a) in implementing those transactions. *Id.* at 431-32.

The Eighth Circuit's reasoning, adopted below by the Commission as its own, has special—and we might add obvious—force in this case. The express rights of the trackage rights tenants to use their own crews was expressly recognized by the Commission to be a material term of each of the trackage rights applications it approved as being in the public interest. (Pet. App. 67a.) If the RLA were to apply to the crew selection process, the transaction approved by the Commission could be postponed while the "almost interminable" major dispute procedures of that Act were exhausted, or indeed frustrated altogether by threat of or resort to strike. The possibility of a strike in this case is not far-fetched: the MP's employees have already threatened and been enjoined from striking over this very matter. See note 8, *supra*.

The possibility that MP crews could resort to self help against the tenants has, if anything, even graver consequences.[10] The very purpose of the grant of trackage rights was to protect and foster a competitive relationship between the tenants and the MP. It is inconceivable in the first instance that the tenants should have to bargain with and rely on MP employees in seeking to wrest new or protect existing traffic from the MP. And it would be astonishing if, as a result of a transaction approved by the Commission to maintain competition between the MP and the tenants, Congress intended to permit MP employees to interfere with and possibly shut down the tenants' entire operations. Moreover, if the MP employees demand, upon pain of strike, that MP ban tenant trains with tenant crews, and the tenant's employees demand, upon pain of strike, that the tenants not hire MP crews, a stalemate will result. Commerce will be interrupted and the Commission's approval of the trackage rights applications will be nullified. And finally, use of MP crews to operate the trains of the tenant lines obviously would require the approval of the MP, which would thus be empowered to frustrate the competition that the Commission intended to protect and preserve.

The short of the matter is that the Commission's reasoning was clear. It stated the unions' contentions and then rejected them because the tenants' ability to crew their own trains was material to the transaction and was thus exempt from RLA procedures under the rationale of *BLE* v. *CNW*. The decision may not be marked by organizational elegance, but "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v.

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[10] The RLA provides for bargaining only between one carrier "and the employees thereof," 45 U.S.C. § 152 First, not between one carrier and the employees of another. But if, as the decision below seems to suggest, the Act *could* be read to require the tenants to bargain with MP employees over the terms and conditions of employment of MP employees by the tenants, then presumably all of the Act's provisions would apply, including the MP's employees' right to resort to self help (such as picketing) against the tenants if their demands were not met.

FPC, 324 U.S. 581, 595 (1945). See also *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 532-35 (1946); *ICC* v. *Columbus & Greenville Railway*, 319 U.S. 551, 555 (1943).

B. The Decision Below Conflicts in Principle With the Decisions of Other Circuits.

The Eighth Circuit's decision in *BLE* v. *CNW* discussed above is not the only one to have held the RLA superseded by the Interstate Commerce Act with respect to disputes arising over implementation of ICC-approved transactions. Other decisions to the same effect include *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (employee protection provisions ordered by ICC pursuant to merger are controlling in case of conflict with RLA procedures); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972) (minor dispute procedures of RLA are superseded by ICC-imposed order under § 5(2)(f) [now § 11347]); *IAM* v. *Northeast Airlines*, 400 F. Supp. 372, 373-74 (D. Mass. 1975), *aff'd*, 536 F.2d 975 (1st Cir. 1976) (RLA "is not applicable where the dispute arises out of a merger" because "Congress has provided a special mechanism for resolving the numerous problems atendant on such a merger"); *UTU* v. *Norfolk & Western Ry.*, 332 F. Supp. 1170, 1174 (N.D. Ohio 1971) ("plain language" of Interstate Commerce Act conferred "exclusive and plenary jurisdiction upon the ICC to approve mergers and relieve carriers from all other restraints of federal law, without carving a special exception with regard to the Railway Labor Act"). And the Sixth Circuit ruled in *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), in language echoing the Eighth Circuit's quoted above:

> "The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if au-

> thority to adjust work realignments through fair compensation did not exist. Since, under the Railway Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied. *Brotherhood of Loc. Engineers* v. *Chicago & Northwestern Ry. Co.*, *supra*."

See also *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1953), which held the procedures of the RLA inapplicable with respect to mergers approved by the CAB, under the protection provisions of the Civil Aeronautics Act, even though those provisions, which were generally similar to those in the Interstate Commerce Act, do not contain an express preemption provision of the kind found in 49 U.S.C. § 11341(a). See 49 U.S.C. App. § 1378 (1982 ed.).[11]

In the case at bar the court of appeals sought to distinguish *BLE* v. *CNW* on the ground that the Eighth Circuit in that case "recognized that immunity attached only to obstacles that would frustrate fruition of the" ICC-approved transaction. (Pet. App. 18a.) But as we have shown above, and as the Commission ruled below, the RLA major dispute procedures, if applicable to the crew selection process, *would* be an obstacle to fruition of

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[11] *Texas & New Orleans R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), conflicts in certain respects with the authorities cited in the text. There the court ruled that the Norris-LaGuardia Act barred it from enjoining a threatened strike over the carrier's effort to implement an ICC-approved transaction. We believe that the court erred in holding that § 11347 [then § 5(2)(f)] of the Interstate Commerce Act is not part of the national pattern of labor legislation to which the Norris-LaGuardia Act must be accommodated. See *United States* v. *Lowden*, 308 U.S. 225, 236-38 (1939). In any event, even in that case the court acknowledged that union resorts to the RLA that were "contrary to the public interest" in the context of ICC-approved transactions would be unenforceable. 307 F.2d at 161-62.

the approved trackage rights transactions. Thus the court's distinction is one without a difference.

Moreover, the decision below misunderstands § 11341(a) and in that respect also is inconsistent with, if not squarely in conflict with, the Eighth Circuit. That section provides in pertinent part (emphasis added):

> "A carrier * * * participating in * * * a transaction approved by * * * the Commission under this subchapter may carry out the transaction * * * without the approval of a State authority. A carrier * * * participating in that approved * * * transaction *is exempt* from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *."

As that plain language makes clear, the Commission is not called upon to do anything under § 11341(a). The types of transactions (including trackage rights transactions) that require Commission approval are set out in § 11343, and the criteria according to which the Commission is directed by Congress to grant or deny approval are set forth in § 11344. In particular, § 11344(c) provides that the Commission shall grant approval if "it finds the transaction is consistent with the public interest." Section 11341(a) then provides, without requiring further Commission interposition, that a carrier participant "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out" the transaction that the Commission has approved. The Commission itself, in determining under § 11344 whether the public interest warrants approval of a proposed transaction, is not required to determine, or to make any findings, whether it would be "necessary" to override some particular law to effectuate the transaction if approved. *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[12]

[12] In *Schwabacher*, the Court explained that Commission approval of a proposed railroad merger "is dependent upon three, and upon only three considerations," those then set forth in the predecessor to § 11344. Following Commission approval, the "approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *.'" 334 U.S. at 194. *BLE* v. *CNW* and other such decisions by the lower courts in cases involving the RLA are consistent with that decision; the decision below is not.

That is the point the Commission was making when, in answer to the contention of the unions that its initial orders approving the trackage rights applications did not expressly state that the carriers were exempt from the RLA, it said (Pet. App. 60a):

> "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints."

And that is precisely what the Eighth Circuit ruled in rejecting a similar contention by the union in *BLE* v. *CNW* that the Commission had failed to make an express finding of exemption. The court held that the Commission's approval of a transaction, and its imposition of the required employee protections, "carried with it any exemption from the restraints of other laws as contemplated by § 5(11) [now § 11341(a)] to the extent necessary to carry out the merger." 314 F.2d at 432.

It is true that the Commission's approval of a transaction immunizes the carrier participants from the RLA only to the extent necessary to implement the transaction. Thus it may be that, subsequent to the Commission's order of approval, a union will argue that the carriers are seeking more immunity from the major dispute procedures of the RLA than is necessary to implement the approved transaction. In such a case the issue for decision will be whether application of the RLA

would frustrate or impede implementation: if so, then the carriers are exempt from the RLA under § 11341(a). The issue will not turn on whether the Commission, in its order of approval, made any findings of the need for an exemption under § 11341(a) from some other statute for, as shown above, that section requires no action whatever by the Commission in passing on an application subject to § 11343. Rather, the function of the Commission under § 11344 is to determine whether a grant of the application is in the public interest and otherwise comports with the standards specified therein.[13]

The court of appeals' misunderstanding of § 11341(a) led it to the erroneous conclusion that the Commission "rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary" to the transaction it had approved. (Pet. App. 10a.) As we have shown, the Commission correctly construed § 11341(a) as not requiring findings with respect to exemption in the initial order of approval. When the issue of exemption subsequently arose, the Commission adequately explained why the crew selection process necessarily was exempt from the RLA. On both counts the Commission's decision is squarely in keeping with the statute and with *BLE* v. *CNW* (and the other decisions cited above), and on both counts the decision of the court of appeals is in conflict with the principle of those decisions.

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[13] This is not to say that an opponent of an application could not contend that the grant of the application would not be in the public interest under the circumstances of the particular case if the result would be to override rights under another statute such as the RLA, and the Commission might well have a duty to consider such a contention if made, but no such contention was made in the initial agency proceeding regarding the terms of the trackage right applications relative to crew selection.

C. Certiorari Is Warranted Now So That the Court May Resolve the Relationship Between the Two Statutes.

The role of the RLA in disputes arising out of carrier efforts to implement ICC-approved rail transactions presents the most pressing labor issue in the rail industry today. Litigation over this issue has erupted all over the country and as a consequence many transactions, already determined by the Commission to be in the public interest according to the criteria established by Congress in § 11344, have been or may be impeded. Thus, in *IAM* v. *Boston and Maine Corporation*, No. 84-3703-T (D. Mass. filed Nov. 15, 1984), the plaintiff union, urging the applicability of the RLA and relying on the decision of the court of appeals in the case at bar, has sought to enjoin the Boston and Maine, the Delaware and Hudson, and the Maine Central—three carriers whose common control by Guilford Transportation Industries was approved by the Commission under § 11343[14]—from seeking to arbitrate a dispute over implementation pursuant to the mandatory arbitration provisions prescribed by the Commission. Other litigation also turning on the relation between the two statutes includes *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *pdg. on appeal*, No. 84-1465 (8th Cir.) (discussed at note 8, *supra*); *RLEA* v. *Butte, Anaconda and Pac. R.R.*, No. CV-85-73-BU (D. Mont.), *pdg. on appeal*, No. 85-3875 (9th Cir.) (preliminary injunction granted plaintiff claiming applicability of RLA to ICC-approved sale and lease); *RLEA* v. *Staten Island Railroad Corp.*, No. CV-85-1532 (E.D.N.Y., decided May 21, 1985), *pdg. on appeal*, No. 85-7483 (2d Cir.) (dismissal of suit to compel carrier to bargain under RLA over ICC-approved

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[14] See *Guilford Transp. Industries, Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 294 (1982), *aff'd in relevant part, Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transp. Industries, Inc.—Control—Delaware and Hudson Ry.*, 366 I.C.C. 396 (1982), *aff'd in relevant part, Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

sale transaction); *UTU* v. *Maine Central R.R.*, No. 85-0184-P (D. Me.) (suit to compel carrier to bargain under RLA over ICC-approved lease transaction); *Brotherhood of Locomotive Engineers* v. *Boston and Maine Corp.*, No. 85-2882-K (D. Mass.), *pdg. on appeal*, No. 85-1852 (1st Cir.) (dismissal of suit to compel carrier to bargain under RLA over ICC-approved lease transaction); *UTU* v. *Boston and Maine Corp.*, No. 85-3475-K (D. Mass.) (suit to compel carrier to bargain over ICC-approved lease transaction); *UTU* v. *Norfolk and Western Ry. Co.*, No. 85-3410 (D.D.C.) (suit to enjoin arbitrated implementing agreement and to compel the carrier to bargain under the RLA over ICC-authorized lease transaction, dismissed Nov. 27, 1985).

The pendency of all of these suits does not fully reflect the confusion and uncertainty in the rail industry over implementation of ICC-approved transactions, for on many rail properties unions have demanded bargaining under the RLA over union proposals that, if agreed to by the carrier, would block or impede implementation of approved transactions. Not all of those demands have yet spawned lawsuits, but the carriers generally view those demands as nonmandatory subjects of bargaining and litigation on that score is probable if not inevitable. In the meantime, whether in litigation or not, the carriers and the unions are at loggerheads. Neither side is served by this uncertainty—as evidenced by the unions' cross-petitions for certiorari in this case—and while it persists the implementation of approved transactions is being or may be postponed.

The fact that the court of appeals in the instant case has ordered a remand to the Commission should not be a deterrent to certiorari. On remand the Commission can only repeat, for the reasons stated by the Eighth Circuit in *BLE* v. *CNW*, that the RLA is preempted with respect to the crew selection provisions of the approved trackage rights transactions. That will not ameliorate

the harm caused by the ruling of the court below that the RLA can be preempted only to the extent found necessary by the Commission, for the unions will continue to brandish that decision (as they are now) in support of their contention that carriers must follow RLA procedures (and possibly face a strike) in seeking to implement transactions that the Commission has already approved in decisions that do not make any express findings under § 11341(a) concerning the RLA.

In sum, the decision below, the inconsistent results reached in the other litigation that is already pending, and the outstanding union bargaining demands mentioned above, are causing grave uncertainty and labor relations disputes throughout the rail industry. Management and labor are apparently in accord on one point, however, which is that the Court's guidance is needed now.

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted,

HARRY LUSTGARTEN
6548 Country Squire Lane
Omaha, Nebraska 68152
(402) 571-1265

RICHARD T. CONWAY
(Counsel of Record)
WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

KENNETH P. KOLSON
Association of
American Railroads
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2100

DAVID P. LEE
General Counsel
National Railway Labor Conference
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

Counsel for Amici Curiae

December 6, 1985

(1) (8)

Nos. 85-792 and 85-793

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

56 P

QUESTION PRESENTED

Whether the Interstate Commerce Commission's approval of a transaction under the rail consolidation provisions of the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 11341-11351, is sufficient to exempt a party to the transaction from provisions of the Railway Labor Act "as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a)) without a specific Commission finding that the exemption is "necessary."

PARTIES TO THE PROCEEDINGS

The petitioner in No. 85-792 is the Interstate Commerce Commission and the petitioner in No. 85-793 is the Missouri-Kansas-Texas Railroad Company. The following were also parties in the court of appeals:

Denver & Rio Grande Western Railroad Company;
Union Pacific Railroad Company;
Missouri Pacific Railroad Company;
Brotherhood of Locomotive Engineers;
United Transportation Union; and
United States of America.

The Association of American Railroads and the National Railway Labor Conference participated as amici curiae in support of the petitions for rehearing and suggestions for rehearing en banc.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a)[1] is reported at 761 F.2d 714. The opinions of

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[1] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 85-792.

the Interstate Commerce Commission (Pet. App. 51a-54a, 55a-68a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on May 3, 1985. Petitions for rehearing were denied on August 9, 1985 (Pet. App. 48a-50a). The petitions for a writ of certiorari were filed on November 7, 1985 and granted on March 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATUTES INVOLVED

Relevant provisions of the Interstate Commerce Act, 49 U.S.C. 11341, 11343; 49 U.S.C. (& Supp. II) 11344, 11347, and the Railway Labor Act, 45 U.S.C. 156 and 157, are set out at Pet. App. 69a-82a.

STATEMENT

The Interstate Commerce Commission has broad authority to examine, condition, and approve proposed rail carrier consolidations. In 1982, the Commission approved a major consolidation of the Union Pacific (UP), Missouri Pacific (MP), and Western Pacific (WP) railroad companies, requiring, among other conditions, that those railroads grant trackage rights to their competitors, the Missouri-Kansas-Texas Railroad Company (MKT) and the Denver & Rio Grande Western Railroad Company (DRGW), to ameliorate anti-competitive effects of the merger. This case presents a question arising from the trackage rights transactions.

MKT and DRGW each proposed, and the Commission approved, trackage rights agreements that reserved the rights of MKT and DRGW to conduct operations using their own crews. Months after the Commission approved the consolidation and the trackage rights transactions, the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU)—respondent labor unions representing employees of MP—objected to the crewing plans. BLE and UTU contended that they had an established right, as representatives of MP's employees, to participate in crew assignment determinations when MP's tracks are used by other carriers, and that those rights could not be changed except in accordance with the Railway Labor Act (RLA), 45 U.S.C. 156, 157.

The Commission found no evidence that the unions had any established right to participate in determining crews of other railroads operating over MP's tracks. It also held that, in any event, its approval of the trackage rights transaction was dispositive: MKT's and DRGW's reservation of the right to crew their own trains was a clearly stated term of their trackage rights proposals and, under the relevant provision of the Interstate Commerce Act (ICA), 49 U.S.C. 11341(a), the Commission's approval automatically exempted the carriers participating in the trackage rights transactions from any conflicting requirements imposed by the RLA. The unions petitioned for judicial review, and a divided court of appeals vacated the Commission's decision. The majority ruled that Section 11341(a) does not automatically exempt carriers participating in approved transactions from inconsistent provisions of other laws and that the Commission "must explain why termination of the [Union's] asserted right to participate in crew selection is necessary to effectuate" the Commission-approved trackage rights transactions (Pet. App. 45a).

A. The Statutory Framework

Chapter 113 of the Interstate Commerce Act, 49 U.S.C. (& Supp. II) 11301 *et seq.*, vests the Interstate Commerce Commission with exclusive and plenary jurisdiction to examine, condition, and approve rail carrier combinations, including the consolidation of two or more carriers (49 U.S.C. 11343(a)(1)) and the acquisition of trackage rights by one carrier over the lines of another (49 U.S.C. 11343(a)(6)). The statutory provisions grant the Commission broad authority to evaluate the effects of these transactions on interested persons and the public. See 49 U.S.C. (& Supp. II) 11341-11351.

Section 11344(c) provides that upon application of the parties, the Commission may conduct a proceeding and "shall approve and authorize a transaction under this section when it finds that the transaction is consistent with the public interest." 49 U.S.C. 11344(c). That section identifies specific criteria, including "the interests of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and "whether the proposed transaction would have an adverse effect on competition" (49 U.S.C. 11344(b)(1)(E)), to guide the Commission's consideration. 49 U.S.C. 11344(b).[2] Section 11344(c) also provides

[2] Section 11344(b) instructs that in situations, as here, involving the merger or control of at least two Class I railroads, the Commission shall consider "at least" the following factors (49 U.S.C. 11344(b)(1)):

(A) the effect of the proposed transaction on the adequacy of transportation to the public;

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transactions;

that the Commission "may impose conditions governing the transaction." 49 U.S.C. 11344(c).

Section 11347 provides that the Commission shall impose conditions to protect the interests of railroad employees who are adversely affected by an approved transaction. 49 U.S.C. (Supp. II) 11347. The Commission has formulated standard labor protective conditions that govern consolidations (New York Dock conditions) and the grant of trackage rights (Norfolk & Western conditions).[3] These conditions ensure that

(C) the total fixed charges that result from the proposed transaction;

(D) the interest of carrier employees affected by the proposed transaction; and

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

[3] See *New York Dock Ry.—Control—Brooklyn Eastern District Terminal*, 360 I.C.C. 60, aff'd *sub nom. New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979); *Norfolk & W. Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry.—Lease & Operate*, 360 I.C.C. 653, 664 (1980), aff'd *sub nom. Railway Labor Executives' Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982). These conditions generally provide that an employee who is dismissed from his job or placed in a lower paying position as a result of the approved transaction will continue, for a period of years, to receive the equivalent of the wages he received prior to displacement. The employee must accept available work and will receive moving expenses if relocation is necessary. Work transfers are effected through negotiations between the carrier and the union, which, in turn, are subject to binding arbitration.

The railroad industry's use of labor protective provisions originated in the Washington Job Protection Agreement of

transactions found to be in the public interest can be consummated without labor strife by providing a "fair arrangement" (49 U.S.C. (Supp. II) 11347) for displaced employees.[4]

When the Commission has approved a transaction, the statute exempts the participants from any federal, state, or local law that would interfere with their carrying out the transaction or conducting business pursuant to it. Section 11341(a) provides (49 U.S.C. 11341(a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold,

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1936, a voluntary agreement between industry and labor. Congress later amended former Section 5(2)(f) of the ICA to provide that the ICC must impose labor protective conditions when approving rail consolidations. See Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905. The statutory provisions have since been amended and recodified in their present form. See 49 U.S.C. (Supp. II) 11347. The rather complicated history of labor protective provisions is recounted in *New York Dock Ry.* v. *United States*, 609 F.2d at 86-90.

[4] The conditions devised by the Commission under Section 11347 for application to approved transactions stand in sharp contrast to the RLA's much more cumbersome work change procedures. Under the RLA, an attempt to change collective bargaining agreements results in a "major dispute." *Elgin, J. & E. Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). The parties to the dispute must engage in a protracted procedure to resolve their differences, which includes negotiation, mediation, voluntary arbitration, and conciliation. See 45 U.S.C. 156, 157. If the parties are unable to reach an agreement, either party may resort to economic self-help such as a lock-out or strike. See generally *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378-380 (1969).

> maintain, and operate property, and exercise control or franchises acquired through the transaction.

This provision exempts a Commission-approved consolidation or grant of trackage rights from legal obstacles that would otherwise bar or impede its implementation.

B. The Union Pacific Consolidation and the Grant of Trackage Rights to MKT and DRGW

The present dispute arises out of the Commission's approval of the consolidation of the Union Pacific, Missouri Pacific, and Western Pacific railroad companies, subject to various competition and labor protective conditions. *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R.—Control—Missouri Pacific Corp. & Missouri Pacific R.R.* (*UP-Control-MP*), 366 I.C.C. 462 (1982). MKT and DRGW proposed, and the Commission approved, trackage rights agreements that would permit those railroads to conduct operations over MP tracks. As the record in the Commission proceeding demonstrates, the participants—including BLE and UTU—fully understood that MKT and DRGW had reserved the right to use their own crews for operation of their trains over MP lines.

Union Pacific Corporation filed its application for Commission approval of the consolidation on September 15, 1980. *UP-Control-MP*, 366 I.C.C. at 471 (Finance Docket No. 30,000). A number of railroads (including MKT and DRGW), labor unions (including BLE and UTU), and other entities objected and sought Commission-imposed conditions (*id.* at 562-625). MKT claimed that the merger would have serious anticompetitive effects and proposed that it be

given the right to run its trains on MP tracks to preserve its competitive capabilities (*id.* at 566). DRGW made a similar claim and also proposed that it have the right to use MP lines (*id.* at 572). The MKT and DRGW proposals each specifically stated that the tenant railroad would have the right to supply its own crews when operating trains on MP tracks.[5] BLE and UTU requested labor protective conditions for both the UP-MP-WP primary transaction and the MKT and DRGW trackage rights requests. However, the unions did not oppose the MKT and DRGW proposals as to crewing. See Pet. App. 61a-65a.

The Commission held hearings on the proposed consolidation from March 1981 to January 1982. MKT and DRGW witnesses explained the basis for their trackage rights proposals (see Pet. App. 63a-64a). Neither BLE nor UTU challenged the MKT and DRGW proposals to use their own crews to conduct trackage rights operations (*ibid.*), and neither union suggested that it would be entitled to a voice in the MKT and DRGW crew selections (*id.* at 64a-

[5] MKT's proposed trackage rights agreement, filed in January 1981, stated that "MKT, with its own employees, and at its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." Proposed Trackage Rights Agreement § 5, Finance Docket No. 30,000 (Sub.-No. 25). See Pet. App. 62a. DRGW's proposed trackage rights agreement, also filed in January, 1981, stated that "Rio Grande may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars to points on or over the Joint Track." Proposed Trackage Rights Agreement § 6(c)(3), Finance Docket No. 30,000 (Sub.-No. 18). See Pet. App. 62a. On February 20, 1981, MKT and DRGW filed verified statements supporting their trackage rights applications that further indicated their intentions to use their own crews (*id.* at 62a-63a).

65a). Following the hearings, the parties submitted briefs stating their positions. Again, neither BLE nor UTU challenged the proposal of MKT and DRGW to use their own crews when operating their trains over MP tracks (*id.* at 65a).

On October 20, 1982, the Commission served its order approving the UP-MP-WP consolidation and partially approving the MKT and DRGW trackage rights proposals, both subject to various conditions. *UP-Control-MP*, 366 I.C.C. at 653-655. The Commission approved MKT's "north-end" trackage rights proposal, authorizing MKT to use MP tracks in Iowa, Kansas, Missouri, and Nebraska, but denied approval of MKT's "St. Louis" trackage rights proposal, involving trackage in Missouri, and its "south-end" proposal, involving MP trackage in Texas. 366 I.C.C. at 566-572. The Commission approved DRGW's proposal for trackage rights over MP tracks between Pueblo, Colorado and Kansas City, Missouri. 366 I.C.C. at 572-578. Approval of the consolidation was conditioned on the grant of the trackage rights by the consolidating carriers. The Commission imposed standard labor protective conditions (see note 3, *supra*) on the consolidation transaction and the trackage rights transactions. 366 I.C.C. at 618-622.

Numerous parties sought judicial review of the Commission decision; however, neither BLE nor UTU challenged the MKT and DRGW trackage rights transactions or the terms of those transactions giving MKT and DRGW the right to use their own crews. The Commission's decision was affirmed in all relevant respects. *Southern Pacific Transportation Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984), cert. denied, No. 84-621 (Feb. 19, 1985).

C. The Present Dispute

The UP-MP-WP consolidation was consummated on December 22, 1982. See *Missouri Pacific R.R.* v. *United Transportation Union*, 580 F. Supp. 1490, 1495 (E.D. Mo. 1984), aff'd, 782 F.2d 107 (8th Cir. 1986). See 85-792 Pet. Add. 6a.[6] On December 31, 1982, MP informed its employees' representatives that MKT would soon begin trackage rights operations on MP lines and that " '[n]o Missouri Pacific employees will be adversely affected as a result of the utilization of these trackage rights * * *' " (*ibid.*). UTU objected to the MKT operations by a letter dated January 4, 1983, stating that " 'it is our position that any and all service operated northward on Missouri Pacific tracks out of Kansas City, Missouri be protected by Missouri Pacific (Proper) road crews' " (*ibid.*). Meanwhile, MKT, consistent with its trackage rights proposal, entered into crewing agreements with its employees. Shortly thereafter, MKT commenced operations over MP tracks using its own crews (*ibid.*).[7]

On March 28, 1983, UTU officials accused MP of permitting a " 'trespass on [their] collectively bar-

[6] Because the *Missouri Pacific* decision is closely related to the present dispute, the Commission reproduced it in full as an addendum to its petition (85-792 Pet. Add. 1a-39a). UTU petitioned for a writ of certiorari before judgment while that case was pending before the Eighth Circuit. See *United Transportation Union* v. *Missouri Pacific R.R.*, No. 85-1054, noting its close relationship to the present case (85-1054 Pet. at 2-3). The Eighth Circuit later affirmed the decision. 782 F.2d 107 (1986).

[7] DRGW, consistent with its proposal, decided to use MP employees temporarily in exercising its trackage rights (Pet. App. 8a).

gained agreements * * * by non-Missouri Pacific employees' " (85-792 Pet. Add. 7a). UTU stated that it would initiate a strike against MP if MKT crews continued to conduct operations over MP track without UTU consent. On March 30, 1983, MP sought and received a temporary restraining order—and, later, an injunction—prohibiting UTU's threatened strike (*id.* at 7a-8a, 32a).[8]

Meanwhile, on April 4, 1983, BLE filed a "Petition for Clarification" requesting the Commission to clarify "its intent as to the crew manning or assignments of the trains to be operated by [MKT and DRGW]" under the Commission approved trackage rights (C.A. App. 2). The petition stated that "[i]t is * * * necessary that the Commission clarify the intent of its order and inform the parties as to the method available to resolve any dispute as to crew manning and the extent to which [DRGW] and MKT may use their crews to operate trains over the lines of [MP]" (*id.* at 5). On May 12, 1983, the Commission denied the petition, finding no need for clarification (Pet. App. 51a-54a). The Commission stated that "[i]nasmuch as DRGW and MKT proposed in their applications that the operations would

[8] The district court concluded that the Commission's approval of the trackage rights transactions exempted MP from "any requirement of the RLA" to negotiate over crew selection (85-792 Pet. Add. 23a). The court emphasized (*id.* at 28a):

> [A]llowing UTU to strike would be tantamount to saying that UTU has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest.

The decision was affirmed on appeal. 782 F.2d 107 (8th Cir. 1986).

be performed with their own crews, our approval of the applications authorizes such operations" (*id.* at 54a). The Commission also noted that it had "unambiguously specified that trackage rights tenants may perform operations using their own crews" in other recently issued decisions dealing with DRGW's trackage rights. *Ibid.* (footnote omitted); see Pet. App. 8a-9a.

On May 31, 1983, BLE and UTU each filed a "Petition for Reconsideration" of the Commission's May 12, 1983 decision (C.A. App. 47-55, 71-84). The unions claimed that their established relationship with MP as representatives of its employees gave them a right to participate in decisions with respect to crewing of trains operated over MP tracks even if operated by another carrier. They argued that crew assignment disputes must be settled under the RLA and that even if Commission approval of a rail consolidation could exempt the railroads from RLA requirements, the Commission failed to make findings necessary to support the exemption. They made the further argument that the tenant railroads' use of their own crews would violate the requirement of Section 11347 of the ICA that labor receive certain protection in connection with approved consolidation transactions. See Pet. App. 57a.[9]

[9] Neither union identified the precise source of their purported right to control the crewing of all trains exercising trackage rights over MP tracks. BLE simply stated, without further explanation, that "[t]he collective bargaining agreements in effect and the existing objective working conditions guarantee that all work performed on the lines of the Union Pacific and the Missouri Pacific be performed by their employees" (C.A. App. 53). UTU claimed, without elaboration, that "th[e] Commission has authorized MKT and DRGW to perform acts which are contrary to the Railway Labor Act—

The Commission denied the petitions for reconsideration (Pet. App. 55a-68a). The Commission rejected at the outset the union's contention that "UP-MP employees, through their bargaining agents, have the right to participate in the trackage rights crew selection process," finding the unions' argument that they had any such underlying rights "unpersuasive and unsupported by the record" (*id.* at 58a-59a, 65a). The Commission stated that "the trackage rights agreements do not involve a change in UP-MP employees' working conditions in a manner contrary to RLA requirements" (*id.* at 59a). The Commission then said that, in any event, Commission approval "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA" (*ibid.*). The Commission also rejected the contention that its approval of a transaction exempts a railroad from the requirements of the RLA only if it first makes special findings of necessity, explaining (*id.* at 67a):

> Trackage rights agreements are considered under the criteria of 49 U.S.C. 11344 and if those criteria are met, the agreement is approved. The approval confers self-executing immunity on all material terms of the agreement from all other

i.e., that Act's prohibition on unilateral change on [*sic*] working conditions—and to the employee protective provisions imposed in this case" (C.A. App. 77). It should be noted that any MP employee represented by BLE or UTU who might be displaced by MKT's or DRGW's exercise of trackage rights was already eligible for compensation in accordance with the Commission-imposed labor protective provisions. See note 3, *supra*. The unions claimed the *additional* right, on behalf of MP employees, to participate in the crew selection for MKT and DRGW trains. See Pet. App. 8a.

law to the extent necessary to permit implementation of the agreement.

The Commission observed that the MKT/DRGW crewing provisions, which the railroads specifically set forth when applying for trackage rights (see *id.* at 62a-65a), "are material terms of the agreement and may be implemented without any other approval" (*id.* at 67a). The Commission also explained that Section 11347 of the ICA protects labor through the imposition of labor protective conditions providing compensation to displaced employees. It does not prevent railroads from implementing changes in working conditions that are contemplated by the authorized transaction (Pet. App. 60a).

BLE and UTU sought judicial review, contending, first, that the Commission failed to make findings necessary to support the Section 11341(a) exemption from the RLA requirements and, second, that the ICA's labor protective provisions preserve the unions' purported rights to participate in MKT's and DRGW's crewing assignments. A divided court of appeals vacated the May 1983 and October 1983 decisions and remanded the case to the Commission (Pet. App. 1a-45a).

The court first addressed the timeliness of the unions' petitions for judicial review. It recognized (Pet. App. 11a-12a) that the unions were, in effect, challenging aspects of the Commission's original approval decision, served on October 20, 1982, and that the 60-day period for judicial review of that decision had long since passed. See 28 U.S.C. 2344. The court nevertheless held that the unions' challenges were timely, finding that the unions had inadequate notice that the Commission's approval of the MKT and

DRGW trackage rights proposals would permit those railroads to select their own crews (Pet. App. 12a-14a).[10]

The court then turned to the merits of the unions' claims. It concluded that the Commission's failure to make specific findings of necessity for exemption of the crewing arrangement from any conflicting requirements of the RLA was "decisive" (Pet. App. 15a).[11] The court reasoned that the Commission had misinterpreted the provision of Section 11341(a) exempting any person participating in an approved transaction from "the antitrust laws and from all other law * * * as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court specifically rejected the Commission's position that, upon Commission approval of the transaction pursuant to the public interest criteria set forth in 49 U.S.C. (& Supp. II) 11344, Section 11341(a) automatically exempts the participants from any legal obstacle to implementation of a material term of the transaction (Pet. App. 16a-20a).

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[10] The court stated (Pet. App. 12a (emphasis in original)):

> The Commission and the railroads argue that the trackage applications specifically noted that D&RGW *might*, and MKT *would*, use their own crews and thus there was no ripeness problem. However, those applications were bounded by ICC's general pronouncement that the labor protection conditions would not be violated. As soon as it became apparent that MKT intended to use its own crews, the unions petitioned ICC for clarification of the application of the labor protection conditions.

[11] The court therefore did not address the second question, whether the ICA's labor protective provisions preserve the unions' purported rights to participate in determining MKT's and DRGW's crewing assignments (Pet. App. 20a-21a).

The court stated that "Congress has given [the Commission] broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component" (Pet. App. 16a). The court ruled that the Commission must, in addition to approving the terms proposed by the applicants, make an express finding that an exemption is essential to the success of the transaction, stating (*id.* at 16a n.4):

> [The Commission's] decision-making process, either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction.

The court found that the Commission's "analysis of the necessity for waiving the Railway Labor Act * * * is virtually nonexistent, both in the 1982 decision and in the 1983 decisions" (*id.* at 19a), adding that "the Commission did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act" (*ibid.* (footnote omitted)).

The court, vacating the Commission's decisions, stated in its amended order (Pet. App. 45a):

> On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction.

The court also stated that "[u]ntil such a finding of necessity is made, the provisions of the Railway Labor

Act and the Interstate Commerce Act remain in force" (*ibid.*).[12]

Judge MacKinnon dissented (Pet. App. 22a-39a). He disagreed, first, with the court's determination that the unions' appeals were timely (*id.* at 22a-28a).[13] Turning to the merits, he first criticized the court's failure to examine whether the unions had underlying rights to participate in MKT's and DRGW's crew selection decisions.[14] He then rejected the majority's conclusion that the railroads' right to a Section 11341(a) exemption from the Railway Labor Act depends upon an express Commission finding that the exemption is "necessary."

Judge MacKinnon stated that "[t]he whole basis for granting the trackage rights, which included the

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[12] The court, in its initial opinion, had simply vacated the Commission decisions and left "the parties to their Railway Labor Act remedies" (Pet. App. 21a). That opinion "intimate[d] no view on the merits of the unions' claims about their underlying right to a role in crew selection" (*ibid.*).

[13] He observed, in particular, that "[t]he unions had been on notice since the day the applications for trackage rights were filed on January 13, 1981, that the railroads intended to use their own crews to operate their own trains if their applications for trackage rights were approved" (Pet. App. 26a). He also observed that, "'[a]s a general proposition, * * * if there is *any* doubt about the ripeness of a claim, petitioners must bring their challenge in a timely fashion or risk being barred.'" *Id.* at 27a (quoting *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985) (emphasis in original)).

[14] He observed that the Commission "found that 'the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the crew selection process' of foreign railroads operating under trackage rights" (Pet. App. 29a-30a).

crew selection provisions, was the implicit conclusion that the granting of such rights was *necessary* to the approval of the merger" (Pet. App. 28a (emphasis in original)). He noted that this Court has repeatedly recognized the Commission's broad power to approve rail mergers that are consistent with the public interest and has treated the Section 11341(a) exemption as an attendant consequence of approval (Pet. App. 33a-38a). Finally, he observed that "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of its *competitors*" (*id.* at 39a (emphasis in original)).

SUMMARY OF ARGUMENT

The Interstate Commerce Act gives the Interstate Commerce Commission broad authority to approve proposed railroad consolidations and trackage rights transactions that the Commission finds, after appropriate proceedings, to be consistent with the public interest. When such a transaction has been approved, the ICA itself exempts each participating carrier from all laws "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a).

The court of appeals misconstrued Section 11341(a). Instead of treating the exemption from other laws as an automatic consequence of Commission approval, the court ruled that the Commission must make an express affirmative determination with respect to each transaction term that faces a legal obstacle. It said "[The Commission's] decision-making process, either in the approval or in a later proceeding, must reveal evidence supporting a conclu-

sion that waiver of a particular legal obstacle is necessary to effectuate the transaction" (Pet. App. 16a n.4). This construction of Section 11341(a) is inconsistent with the plain language of Section 11341, with the structure and purposes of the ICA's rail carrier consolidation provisions, and with Commission and court precedent. It would seriously impede the consummation of Commission approved rail consolidations plans.

A. The starting point for interpreting a statute is, of course, the statute itself. In this case, the statutory language is straightforward and unambiguous. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) provides that "[a] carrier, corporation, or person participating in [an] approved * * * transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *." 49 U.S.C. 11341(a).

Under the statute, the Commission must determine whether a proposed consolidation is consistent with the public interest. The Commission is directed to consider specified factors, including impacts on employees and on competition. Interested persons, including labor representatives, have a right to challenge a proposal in whole or in part, and the Commission's determination is, of course, subject to judicial review. But once the proposed transaction is approved, Section 11341(a) confers an exemption of sufficient breadth to enable the parties to implement the transaction and conduct business in accordance with it. The court of appeals misspoke when it said

that "Congress has given [the Commission] broad powers to immunize transactions from later legal obstacles" (Pet. App. 16a). Congress gave the Commission authority to examine, condition, and approve transactions. The "immunization" is a statutory consequence of Commission approval.

B. The ICA's consolidation provisions have two relevant purposes: first, to leave to the carriers themselves the task of formulating and proposing transactions; and second, to expedite those transactions that are in the public interest by replacing the myriad of federal, state, and local laws otherwise affecting such transactions with a single proceeding in which the Commission approves, disapproves, or conditions the rail carriers' proposal in accordance with congressionally prescribed public interest criteria.

The court of appeals' decision defeats these purposes. It would require the Commission to determine which of the terms of a complex transaction are "necessary to effectuate" (Pet. App. 45a) the transaction, a matter that the ICA leaves largely to the business judgment of the carriers. More importantly, by requiring the Commission either to anticipate every conflict with federal, state, or local law or to pass post hoc judgments on the "necessity" of transaction terms when conflicts with other laws later appear, the court's approach would defeat the congressional goal of replacing the various federal, state, and local laws with a single approval proceeding that provides a comprehensive consideration of the public interest.

C. The decision below represents a marked departure from agency and judicial precedent. The Commission has consistently recognized that "[t]he terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is

no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints" (see Pet. App. 60a). The courts of appeals have agreed with that interpretation.

D. This case demonstrates how the court of appeals' construction of Section 11341(a) would seriously impede the express congressional policy of expediting rail consolidations that are consistent with the public interest. The Commission here approved the carriers' consolidation proposal and the trackage rights transactions after extensive review involving hundreds of witnesses and thousands of pages of testimony. MKT and DRGW expressly proposed the crew selection provisions at issue. The unions raised no objection to those provisions at that time and the Commission approved them as elements of the consolidation plan. By allowing the unions to demand a post-approval Commission "necessity" proceeding, the court has ensnared the implementation of a trackage rights transaction—which the Commission not only approved but insisted upon as a condition to its approval of the UP-MP-WP consolidation—in a tangle of legal challenges.[15]

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[15] The court of appeals did not reach the unions' claim that Section 11347 of the ICA requires the Commission to preserve their allegedly established right to crew trains operated over MP's tracks even when operated by other carriers (Pet. App. 20a-21a). There is no reason to remand this case to the court of appeals to resolve that issue. As previously noted, the Commission found no evidence to support the unions' claim that they had an established right to participate in the assignment of crews to non-MP trains that operate over MP tracks (*id.* at 58a-59a, 65a). The court of appeals did not disturb that finding. Accordingly, there is no occasion to remand this case for a determination of how the ICA's labor protective provisions would apply if those rights existed.

ARGUMENT

THE INTERSTATE COMMERCE COMMISSION'S APPROVAL OF A RAIL CARRIER TRANSACTION UNDER SECTION 11344 OF THE INTERSTATE COMMERCE ACT, 49 U.S.C. 11344, BY ITS OWN FORCE, EXEMPTS THE CARRIERS FROM PROVISIONS OF THE RAILWAY LABOR ACT THAT POSE OBSTACLES TO THE IMPLEMENTATION OF THE APPROVED TRANSACTION

The court of appeals erred in holding that the Commission's approval of a proposed transaction under Section 11344 of the ICA is insufficient to exempt a participant from the requirements of other laws—in this case the RLA—unless the Commission makes a specific finding that the exemption is necessary and explains its reasoning to the satisfaction of the reviewing court. That ruling is inconsistent with the plain language of Section 11341(a), the structure and purposes of the ICA's rail consolidation provisions, and longstanding precedent. It will seriously impede the implementation of Commission-approved transactions.[16]

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[16] We note two preliminary matters that merit brief discussion. First, as Judge MacKinnon observed (Pet. App. 22a-28a), there is reason to question the timeliness of the unions' petition to the court of appeals for judicial review. We submit that the unions' petitions were timely for the purpose of reviewing the Commission's denial of BLE's petition for clarification, but the scope of the court's review should have been limited to whether the Commission abused its discretion in concluding that the October 20, 1982 consolidation decision "does not require clarification" (Pet. App. 53a). See *Western Union Telegraph Co.* v. *FCC*, 773 F.2d 375, 380-381 (D.C. Cir. 1985). The unions should not have been permitted to use a petition for clarification (or a subsequent motion to reconsider the denial of that petition) as a wedge for reopening the Commission's final consolidation decision. See *National Bank of Davis* v. *Office of the Comptroller of the Currency*, 725 F.2d 1390 (D.C. Cir. 1984). Thus, the court of appeals had jurisdiction in this case; its first error lay in impermissibly expanding the scope of its review. See *United States* v. *ICC*, 396 U.S. 491, 521 (1970).

Second, the court of appeals' willingness to indulge the unions' unsupported claims that they had an established right to participate in MKT's and DRGW's crewing decisions is, as Judge MacKinnon stated, "inexplicable" (Pet. App. 29a). The Commission specifically found that "the record contains no evidence to support the contention of UTU and BLE that UP-MP employees have rights under collective bargaining agreements to participate in the trackage rights crew selection process" (*id.* at 65a). As Judge MacKinnon explained (*id.* at 29a-30a), the court plainly erred in addressing Section 11341(a)'s impact on the unions' purported rights on the presumption, based on the union's contrary contentions, that these rights existed.

Both of these errors rest, in principal part, on the court's mistaken understanding of "the interpretation to be given various Commission actions" (Pet. App. 11a; see *id.* at 20a-21a). We thus direct our arguments to the court's central mistake, its misunderstanding of the Commission's role in the Section 11341(a) exemption process.

A. The plain language of Section 11341(a) of the Interstate Commerce Act indicates that persons participating in an approved transaction are automatically exempt from other laws "as necessary to let that person carry out the transaction"

The starting point for interpreting a statute is, of course, the language itself. "If the statute is clear and unambiguous 'that is the end of the matter, for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6 (quoting *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)).

In this instance, Congress has unambiguously stated that the Commission's approval of a rail consolidation or trackage rights transaction under the prescribed "public interest" standard automatically exempts transaction participants from federal, state, and local laws that would prevent implementation of the transaction's terms.

The statutory language is both clear and straightforward. Section 11344(c) provides that "[t]he Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest." 49 U.S.C. 11344(c). Section 11341(a) then provides (49 U.S.C. 11341 (a)):

> A carrier, corporation, or person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction, hold, maintain, and operate property, and exercise control or franchises acquired through the transaction.

As the statutory language indicates, the Commission must determine whether a proposed consolidation is consistent with the public interest. That determination is made on the record, after hearing the views of interested persons. See 49 U.S.C. (& Supp. II) 11344. It is guided by specific statutory criteria (49 U.S.C. 11344(b)) and is, of course, subject to judicial review (28 U.S.C. (& Supp. II) 2342). But once the proposed transaction is approved, Section 11341(a) automatically confers an exemption of sufficient breadth to permit implementation of the authorized transaction.

The court of appeals' conclusion that "Congress has given [the Commission] broad powers to immunize

transactions from later legal obstacles" (Pet. App. 16a) is inaccurate. Section 11344 gives the Commission authority to consider, condition, and approve transactions proposed by carriers. The Section 11341 (a) exemption is a congressionally prescribed consequence of Commission approval that extends as far "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). The court of appeals' conclusion that the Commission must make supplemental findings, either in the approval proceeding or in later proceedings, that the exemption from a particular law is "necessary to effectuate" the terms of an approved transaction is also inconsistent with the plain language of the statute. Section 11341(a) says that a participant in an approved transaction "is exempt." The section makes no reference to any contemporaneous or post hoc Commission examination of each potential legal obstacle to determine whether it must be removed. The scope of the exemption is defind by the terms of the approved transaction.[17]

The language of the present Section 11341(a) and Section 11344 is consistent in this respect with statutory language that goes back more than 60 years. Congress enacted the relevant provisions of both sections as part of its recodification, without substantive

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[17] The Section 11341(a) exemption applies, of course, only to terms comprehended by the Commission's approval order. See, *e.g.*, *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 697, 702 (1958). There may be occasions where it is necessary for the Commission to clarify, in a post-approval proceeding, the scope or meaning of the proposal it has approved. See note 23, *infra*. This, however, is not such an occasion: crewing arrangements are plainly central to trackage rights transactions, and MKT's and DRGW's proposals on this score could hardly have been more clearly stated. See pages 43-44, *infra*.

change, of former Section 5 of the ICA. See Pub. L. No. 95-473, 92 Stat. 1337 *et seq.*; H.R. Rep. 95-1395, 95th Cong., 2d Sess. 158-168 (1978). The recodified provisions find their origins in the Transportation Act of 1920, ch. 91, 41 Stat. 456 *et seq.*, and the Transportation Act of 1940, ch. 722, 54 Stat. 898 *et seq.* See generally *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. 298, 315-321 (1954) (appendix to opinion of the Court).

Section 407 of the Transportation Act of 1920, ch. 91, 41 Stat. 480, amended Section 5 of the Interstate Commerce Act of 1887, ch. 104, 24 Stat. 380 specifically to encourage railroad consolidation. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. In particular, it added Section 5(6)(c) to authorize Commission approval of consolidations that promote the public interest. 41 Stat. 482. It also added Section 5(8) specifically to exempt participants in Commission-approved consolidations from federal and state legal obstacles. 41 Stat. 482. Section 5(8) expressly stated (41 Stat. 482 (emphasis added)):

> The carriers affected by any order made under the foregoing provisions of this section * * * *shall be, and they are hereby, relieved* from the operation of the "antitrust laws," * * * and of all other restraints or prohibitions by law, State or Federal, *in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the foregoing provisions of this section.*

This statutory language left no doubt that the ICA's exemption provision attached automatically upon Commission approval and extended as far as necessary to ensure consummation of "anything authorized or required" by the Commission approval order. See

also H.R. Rep. 650, 66th Cong., 2d Sess. 64 (1920) ("An order of the commission approving a specified consolidation may be carried out notwithstanding any State or Federal restraining or prohibitory law to the contrary.").

Section 7 of the Transportation Act of 1940, ch. 722, 54 Stat. 905, amended and recodified Section 5 of the ICA but left the provisions relevant here substantially intact. Former Section 5(6) was subsumed within revised Section 5(2) (see 54 Stat. 905, 908) and former Section 5(8) was subsumed within revised Section 5(11) (see 54 Stat. 908-909). The operative language of revised Section 5(11) remained essentially unchanged, providing (54 Stat. 908-909 (emphasis added)):

> [A]ny carriers * * * participating in a transaction approved or authorized under the provisions of this section *shall be and they are hereby relieved* from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, *insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission* * * *.

This language, like that of the 1920 Act, plainly provided that express terms of a Commission-approved transaction were automatically exempted from preexisting legal obstacles. When Congress recodified this language in the present Section 11341(a) of the ICA, it effected no substantive change. Pub. L. No. 95-473, § 3(a), 92 Stat. 1466; *Trailer Marine Transport Corp.* v. *FMC*, 602 F.2d 379, 383 n.18, 384 (D.C. Cir. 1979). See H.R. Rep. 95-1395, *supra*, at 158-160.

Instead, it preserved the original intent, reflected in the 1940 and 1920 Transportation Acts, that approval of a consolidation confers an exemption of sufficient breadth to permit implementation of the terms of the transaction.[18]

B. The Commission's interpretation of Section 11341(a) is consistent with the structure and objectives of the ICA's consolidation provisions

In addition to scrutinizing statutory language, this Court may ascertain congressional intent by "look-[ing] to the provisions of the whole law, and to its object and policy." *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975) (citation omitted). The overall structure of the ICA consolidation provisions and the purpose of Section 11341(a), as demonstrated by the legislative history, reflect two basic objectives: to

[18] Furthermore, nothing in the plain language or legislative history suggests that laws governing labor relations are to be treated differently than other laws. Congress understood that rail consolidations and related transactions affect labor interests. It therefore instructed the Commission to consider "the interests of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and mandated labor protective provisions to provide compensation for displaced workers (49 U.S.C. (Supp. II) 11347). But these provisions were included precisely because of the inevitable adjustments in labor conditions that accompany rail consolidations and related transactions. Indeed, the courts have long recognized the need for the Commission, as well as similar agencies, to prescribe the methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest. See, *e.g.*, *Brotherhood of Locomotive Engineers* v. *Chicago & N. W. Ry.*, 314 F.2d 424 (8th Cir.), cert. denied, 375 U.S. 819 (1963); *Kent* v. *CAB*, 204 F.2d 263 (2d Cir.), cert. denied, 346 U.S. 826 (1953). See discussion at pages 37-40, *infra*.

leave the design of transactions to the carriers themselves, and to replace diverse regulation with a single public interest proceeding.

Following World War I, Congress identified rail consolidation as an important national goal. "The new policy was embodied in the Transportation Act of 1920, the provisions of which encouraged mergers and consolidations of railroad companies, under the supervision of the Interstate Commerce Commission, in the hope of bringing about a stronger national railroad economy." S. Rep. 1182, 76th Cong., 3d Sess. Pt. 1, at 1 (1940). See, *e.g.*, *Schwabacher* v. *United States*, 334 U.S. 182, 191 (1948). Senate sponsors of the 1920 legislation initially considered giving the Commission power to compel railroad mergers. See *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U.S. at 315-316. However, Congress eventually agreed to withhold that power and, instead, created a scheme whereby the Commission would develop a national plan of consolidation in which railroads would participate voluntarily. See *ibid.*[19] That approach, however, ultimately proved unsuccessful, and it was judged better to leave the initiative to the railroads themselves. See *id.* at 316-319.

Congress therefore took further steps, through the Transportation Act of 1940, "to facilitate merger and consolidation in the national transportation system" (*County of Marin* v. *United States*, 356 U.S. 412, 416

[19] "Although the Commission could promulgate a plan, it was given no affirmative power to put the plan into effect. It was entitled merely to insist that any consolidations submitted to it for approval should conform to the plan. Thus, the whole problem of initiating and developing actual consolidations was left in the hands of the carriers themselves." S. Rep. 1182, 76th Cong., 3d Sess. Pt. 2, at 524 (1940).

(1958) (footnote omitted)). That legislation eliminated the Commission's obligation to promulgate a national consolidation plan, leaving "the power to initiate mergers and consolidations * * * completely in the hands of the carriers." *St. Joe Paper Co.*, 347 U.S. at 319 (footnote omitted). The 1940 Act thus "relieved the Commission of its responsibility to initiate unifications." *County of Marin*, 356 U.S. at 417. " 'Instead, it authorized approval by the Commission of carrier-initiated, voluntary plans of *merger* or *consolidation* if, subject to such terms, conditions and modifications as the Commission might prescribe, the proposed transactions met with certain tests of public interest, justice, and reasonableness * * *.' " *Ibid.* (emphasis in original, quoting *Schwabacher* v. *United States*, 334 U.S. at 193). As this history shows, the statutory scheme plainly contemplates that the carriers themselves have primary responsibility for structuring the proposed transaction. "[A]lthough the Commission in fulfilling its statutory responsibilities is to carefully review all of the terms of a merger proposal and determine whether they are just and reasonable, it is not for the agency, much less the courts, to dictate the terms of the merger agreement once this standard has been met." *United States* v. *ICC*, 396 U.S. 491, 520 (1970).

This clear understanding that it is for the carriers, not the Commission, to formulate and propose transactions has an obvious corollary that is directly in point here: The Commission may approve, disapprove, or condition a transaction, but once it has approved a transaction it is not open to the Commission to make judgments about which terms were sufficiently "necessary" to override other laws. As this Court explained in *Schwabacher* (334 U.S. at 194 (emphasis added)):

> [A]pproval of a voluntary railroad merger which is within the scope of the Act is dependent upon three, and upon only three, considerations: First, a finding that it "will be consistent with the public interest." (§ 5(2)(b).) Second, a finding that, subject to any modification made by the Commission, it is "just and reasonable." (§ 5(2)(b).) Third, assent of a "majority * * * of the holders of the shares entitled to vote." (§ 5(11).) *When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *."* (§ 5(11).)

As this Court recognized, Section 5 consciously limited the Commission's approval power to authorization of carrier-proposed transactions that met a congressionally prescribed test. But once the Commission had determined that the proposed transaction (together with any Commission-imposed conditions) satisfied that test, the ICA itself dictated the consequences.

The present provisions of the ICA state the test without substantive change, requiring a finding that the proposed transaction (as conditioned by the Commission) "is consistent with the public interest." 49 U.S.C. 11344(c). They preserve the basic statutory structure, limiting the Commission's role to approving, disapproving, or conditioning carrier-initiated proposals. And once the Commission determines, after a full hearing and careful examination of the record, that the proposal is consistent with the public interest, the Section 11341(a) exemption permits the carriers

to implement the transaction, without fear that subsequent legal challenges will block or delay execution of one part or another of a fully reviewed and approved plan.

The court of appeals' decision represents a marked departure from this statutory scheme. According to the court, the Commission's approval, based on a finding that a transaction as a whole is in the public interest, is insufficient to exempt the transaction participants from other laws that pose obstacles to implementation of the transaction. Instead, the Commission must examine each transaction term that faces a legal obstacle and determine whether exemption is "necessary to effectuate the transaction" (Pet. App. 16a n.4) and "either in the approval or in a later proceeding, must reveal evidence supporting [each such] conclusion" (*ibid.*). This approach would undermine the statutory scheme in two important respects. First, it would make the design of each transaction a function of a series of term-by-term determinations of "necessity" by the Commission, rather than a result of carrier business judgments followed by a public interest determination in which the Commission is allowed to approve, disapprove, or impose conditions on a transaction, but is not authorized to redesign it. Second, the court of appeals' decision would defeat the congressional goal of replacing a myriad of federal, state, and local legal requirements—whose effect on a transaction may not even be foreseeable when the transaction is consummated—with a single approval process in which a detailed public interest standard is applied by an expert agency that can view the transaction as a whole.

The ICA's approval process provides interested parties—including labor unions—extensive opportuni-

ties to participate in the Commission's consolidation review proceedings and to voice their objections during the "public interest" inquiry. In particular, they may object to approval of a transaction, or particular terms thereof, on the ground that it will undermine the policies expressed in other federal statutes. The Commission must take these objections into account, together with all other comments and objections, in determining whether the merger is "consistent with the public interest" (49 U.S.C. 11344(c)). See, *e.g.*, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79-80 (1944) (antitrust objections to motor carrier consolidation).[20] The Commission's public interest

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[20] The Commission need not, of course, give those objections controlling weight. For example, this Court has long held that the Commission must consider antitrust objections in evaluating a proposed merger, but has further noted:

> Even though such acquisitions might otherwise violate the antitrust laws, Congress has authorized the Commission to approve them if it finds they are in the public interest, "because it recognized that in some circumstances they were appropriate for effectuation of the national transportation policy. * * *."

Minneapolis & St. L. Ry. v. *United States*, 361 U.S. 173, 187 (1959). See also, *e.g.*, *United States* v. *ICC*, 396 U.S. 491, 513 (1970); *Denver & R. G. W. R.R.* v. *United States*, 387 U.S. 485, 492-493 (1967); *id.* at 515 (Harlan, J., dissenting) ("the ICC must take account of antitrust policy in judging the control questions under [former Section 5 of the ICA], but this interest is simply one of the relevant criteria, and if on balance the Commission finds a proposed undertaking to be in the public interest the statute authorizes a grant of antitrust immunity to the transaction"); *Seaboard Air Line R.R.* v. *United States*, 382 U.S. 154, 156-157 (1965); *McLean Trucking Co.*, 321 U.S. at 83 ("the policies of the anti-trust laws determine 'the public interest' in railroad regulation only in a qualified way").

determination is then subject to judicial review. But once the consolidation has been approved as consistent with the public interest, Section 11341(a)'s exemption automatically takes effect. See, *e.g.*, *Minneapolis & St. L. Ry.* v. *United States*, 361 U.S. 173, 186 (1959) (former Section 5(11) "relieves the acquiring carrier, upon approval by the Commission of the acquisition, 'from the operation of the antitrust laws * * *' ").[21]

The Section 11341(a) exemption is, of course, limited; it exempts a participant only "as necessary to let that person carry out the transaction." 49 U.S.C. 11341(a). But that language clearly grants

[21] The Commission's responsibilities are largely the same when labor, rather than antitrust issues are involved. Just as the Commission must examine the transaction's "effect on competition among rail carriers" (49 U.S.C. 11344(b)(1)(E)), it must also consider "the interest of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)). Like the antitrust inquiry, the labor inquiry reflects only one aspect of the public interest analysis. If the Commission approves the transaction based on its determination after balancing of all the relevant factors, that the transaction serves the public interest, Section 11341(a) exempts participants from the otherwise applicable labor law. Indeed, labor interests receive additional protection in the form of statutorily mandated labor protective conditions. See 49 U.S.C. (Supp. II) 11347. These special provisions state that if the Commission's approval results in displacement of carrier employees, those employees will receive special compensation. See, *e.g.*, *Norfolk & W. Ry.* v. *Nemitz*, 404 U.S. 37, 42 (1971) (the labor protective provisions are intended "not to freeze jobs but to provide compensatory conditions"). The provisions ensure that inability of the parties to agree upon changes in working conditions necessary to Commission-approved transactions will not prevent the approved transaction from being implemented. See *Missouri Pacific R.R.* v. *United Transportation Union* (85-792 Pet. Add. 28a).

an automatic exemption from any federal, state, or local law that would otherwise prevent a party from carrying out a term of an approved transaction.[22] It does not authorize the Commission to determine the intrinsic "necessity" of proposed transaction terms, much less to revisit an approved transaction to determine whether terms of a transaction approved as in the public interest are, on second thought, dispensable. The statutory scheme contemplates that objections to transaction terms must be made in the Commission's initial approval proceeding, where they are considered in connection with the overall determination of the public interest. Reliance on post-approval "necessity" proceedings would frustrate the basic purpose of encouraging "carrier-initiated, voluntary plans" (*Schwabacher*, 334 U.S. at 193) and determining in a single proceeding whether such plans, as conditioned by the Commission, are consistent with the public interest.[23]

[22] That point, clearly expressed in the present language, was made especially plain in the previous codifications of the exemption. See 49 U.S.C. (1940 ed.) 5(11) (exemption extends "insofar as may be necessary to enable [participants] to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission"). 49 U.S.C. (1925-1926 ed.) 5(8) (exemption extends "in so far as may be necessary to enable [participants] to do anything authorized or required" by the approved transaction). As previously discussed, the present language makes no substantive change from the previous codifications (see page 27, *supra*).

[23] The Commission does, of course, have authority to entertain a post-approval petition for clarification of particular provisions of a Commission decision. See 49 C.F.R. 1117.1 (providing that the Commission may consider petitions for relief not otherwise covered by the Commission's rules).

C. The Commission's interpretation of Section 11341(a) is consistent with six decades of agency and court interpretation of the statute

The Commission first faced the issue presented here in 1923, only three years after enactment of the Transportation Act of 1920. The United States had secured an injunction under the Sherman Act ordering the Southern Pacific Company to divest itself of control over the Central Pacific Railway. *United States* v. *Southern Pacific Co.*, 259 U.S. 214 (1922). The Southern Pacific Company promptly sought Commission approval under former Section 5 of the ICA to maintain control of Central Pacific. The Commission approved the combination as consistent with the public interest notwithstanding the Sherman Act injunction. *Control of Central Pacific by Southern Pacific*, 76 I.C.C. 508, 515-517 (1923). The Commission further stated (*id.* at 517):

But the Commission's role is limited, in that instance, to clarifying the scope and terms of its prior orders. The Commission's authority to modify its prior orders approving consolidations and related transactions is limited by 49 U.S.C. 11351, which provides that the Commission may supplement its orders "[w]hen good cause exists." Good cause " 'requires some event or change in circumstances which *necessitates* a supplementation or modification * * *.' " *Illinois* v. *ICC*, 713 F.2d 305, 310 (7th Cir. 1983) (emphasis in original; quoting *Greyhound Corp.* v. *ICC*, 668 F.2d 1354, 1362 (D.C. Cir. 1981)). The Commission may also retain jurisdiction to ensure that terms and conditions of approved transactions are being followed. See, *e.g.*, *Penn-Central Merger Cases* 389 U.S. 486, 521-522 (1968). But none of these sources of post-approval review contemplate the reopening of administratively final actions for reconsideration of issues that could have been raised during the Commission's original review. See 49 U.S.C. 10327(i); 49 C.F.R. 1115.4.

> [I]t seems to us that the provisions of [former Section 5(8)] were intended by Congress to remove all active restraints by law and grant authority so far as necessary to enable the carriers affected by our order to do anything authorized or required thereby.

Thus, the Commission concluded, over 60 years ago, that once it approved a consolidation pursuant to the ICA's public interest standards, the ICA's exemption provisions automatically exempted "anything authorized or required thereby" from other legal restraints. The Commission has consistently followed that practice, stating that the exemption provisions are "self-executing" and that, accordingly, there is no need for the Commission to declare that a carrier is relieved from particular restraints. *E.g.*, *Railway Express Agency, Inc., Notes*, 348 I.C.C. 157, 215 (1975); *Revised Regulations Governing Interlocking Officers*, 336 I.C.C. 679, 681-682 (1970); *Texas Turnpike Authority Abandonment By St. Louis Southwestern Ry.*, 328 I.C.C. 42, 46 (1965); *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958).

Notably, the Commission has routinely approved—and the courts of appeals have affirmed—consolidations and operating agreements specifying labor rearrangements that, absent Commission approval and the consequent ICA exemption, could precipitate invocation of the RLA.[24] In the leading case, *Brother-*

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[24] The Commission most recently addressed this issue in *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific Ltd. & Springfield Terminal Ry.—Exemption from 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (I.C.C. Aug. 22, 1985), appeal pending, No. 85-1636 (D.C. Cir.). See 85-792 Pet. Add. 40a-51a. In that decision, the Commission noted the practical importance of resolving labor disputes through the

hood of Locomotive Engineers v. *Chicago & N. W. Ry.*, 314 F.2d 424 (8th Cir.), cert. denied, 375 U.S. 819 (1963), the Commission approved a rail carrier's acquisition of another railroad pursuant to former Section 5(2) of the ICA, subject to a stipulation by the railroads and the affected unions providing labor protective provisions. The stipulation specifically provided that disputes would be resolved through binding arbitration. 314 F.2d at 427. When disputes later arose, the unions refused to go to arbitration, claiming instead that, despite the stipulation, they were entitled to invoke their RLA rights. The court of appeals rejected the union's arguments.

The court recognized that "[the Commission's] power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist." 314 F.2d at 430. It concluded that "Congress intended the [Commission] to have jurisdiction to prescribe the method for determining the solution of labor problems arising directly out of approved mergers" (*id.* at 431). The court stated (*id.* at 431-432):

Commission's labor protective provisions rather than the RLA procedures, stating (85-792 Pet. Add. 50a):

> All of our labor protective conditions provide for compulsory binding arbitration to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated. Under RLA, however, changes in working conditions are generally classified as major disputes with the results that there is no requirement of binding arbitration. * * *. Since there is no mechanism for insuring that the parties will arrive at agreement, there can be no assurance that the approved transaction will ever be effected.

> Thus, like the trial court, we come to the conclusion that to hold otherwise would be to disregard the plain language of [former Section 5(11)] conferring exclusive and plenary jurisdiction upon the [Commission] to approve mergers and relieving the carrier from all other restraints of federal law.

The court specifically rejected the union's argument that the Commission must make express findings relieving the carriers from their RLA obligations (314 F.2d at 432). The court quoted with approval from the Commission opinion in *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958), stating (314 F.2d at 432):

> The terms of [the ICA exemption provisions] are self-executing, and there is no need for this Commission expressly to order or declare that a carrier be relieved from certain restraints. It is sufficient if we make clear what the carrier is authorized to do.

Other decisions have reached similar results, agreeing that the Commission may approve rail consolidations that specify particular labor arrangements and, as a consequence, curtail RLA rights. See, *e.g.*, *Missouri Pacific R.R.* v. *United Transportation Union*, 782 F.2d 107 (8th Cir. 1986), petition for cert. pending, No. 85-1054; *Nemitz* v. *Norfolk & W. Ry.*, 436 F.2d 841, 845 (6th Cir.), aff'd on other grounds, 404 U.S. 37 (1971). Furthermore, that authority is implicit in decisions of this Court and the courts of appeals recognizing the Commission's authority to impose labor protective conditions. See, *e.g.*, *Norfolk & W. Ry.* v. *Nemitz*, 404 U.S. 37 (1971); *Brotherhood of Maintenance of Way Employees* v. *United States*, 366

U.S. 169 (1961); *Railway Labor Executives' Ass'n* v. *United States*, 339 U.S. 142 (1950); *Railway Labor Executives' Ass'n* v. *ICC*, 675 F.2d 1248 (D.C. Cir. 1982); *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979).[25] The cases relied upon by the court of appeals, by contrast, are largely inap-

[25] This Court has noted, in particular, that the purpose of the ICA's labor protective provisions requirement "was not to freeze jobs but to provide compensatory conditions." *Norfolk & W. Ry.*, 404 U.S. at 42; accord, *Brotherhood of Maintenance of Way Employees* v. *United States*, 366 U.S. at 175-176. That purpose is made clear by the legislative history of the labor protective provisions and, in particular, by Congress's rejection of the "Harrington Amendment" to the Transportation Act of 1940, which would have imposed a job freeze upon merging railroads. See *Brotherhood of Maintenance of Way Employees*, 366 U.S. at 173-176. As the Eighth Circuit explained, the rejection of the Harrington Amendment also indicates that Congress empowered the Commission to prescribe alternatives to the RLA for determining the solution of labor disputes arising out of approved transactions. *Chicago & N. W. Ry.*, 314 F.2d at 430-431.

Indeed, the Commission would presumably have authority to approve consolidation plans that override RLA rights even in the absence of Section 11341(a)'s express exemption. For example, the courts long recognized the Civil Aeronautics Board's authority to adjust the seniority rights of employees affected by the merger of two airlines even in the absence of explicit statutory authority to do so. See, *e.g.*, *Kent* v. *CAB*, 204 F.2d 263, 265-266 (2d Cir.), cert. denied, 346 U.S. 826 (1953). Thus, even a " 'private contract must yield to the paramount power of the Board to perform its duties under the statute creating it to approve mergers * * * only upon such terms as it determines to be just and reasonable in the public interest.' " *American Airlines, Inc.* v. *CAB*, 445 F.2d 891, 896 (2d Cir. 1971), cert. denied, 404 U.S. 1015 (1972) (quoting *Kent*, 204 F.2d at 266).

posite, as discussed by Judge MacKinnon at some length in his dissent (Pet. App. 33a-38a).[26]

In sum, the court below has failed to give proper deference to an expert agency's longstanding inter-

[26] In particular, the court mistakenly cited *City of Palestine* v. *United States*, 559 F.2d 408 (5th Cir. 1977), cert. denied, 435 U.S. 950 (1978), and *Texas & N. O. R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), cert. denied, 371 U.S. 952 (1963), for the proposition that the Commission must explain the necessity for a Section 11341(a) exemption (Pet. App. 17a-18a). *City of Palestine* held, upon direct review of a Commission consolidation approval decision, that the Commission exceeded the scope of its approval authority by voiding a contract that was "not germane" to the transaction. 559 F.2d at 414. Here, by contrast, there is no dispute that the Commission properly granted MKT and DRGW trackage rights to ameliorate certain anticompetitive effects of the UP-MP consolidation. See *UP-Control-MP*, 366 I.C.C. at 566-579. There can be no serious dispute that the tenant railroads' reservations of the right to use their own crews are "material terms" (Pet. App. 67a) of those trackage rights. As Judge MacKinnon explained, "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of [their] *competitors*" (*id.* at 39a (emphasis in original)). *Texas & N. O. R.R.* held that the ICA's exemption provision does not confer jurisdiction on the courts, otherwise withdrawn by the Norris-LaGuardia Act, to enjoin labor disputes. 307 F.2d at 156. The court specifically noted that "[i]f it should be determined that the Commission's authority under [former] section 5 is being frustrated by application of [the] Norris-LaGuardia [Act] to the present suit, we would have to conclude that Norris-LaGuardia was preempted by [former] section 5(11), even though [former] section 5 is not labor legislation." 307 F.2d at 158. To the extent that *City of Palestine* and *Texas & N. O. R.R.* contain dicta contrary to the Commission's interpretation of the ICA's exemption provision, we consider those dicta incorrect.

pretation of the statute that it is entrusted to administer. See, *e.g.*, *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 9; *Chevron U.S.A. Inc.*, 467 U.S. at 842-843. The court's departure from established principles of judicial deference is particularly inappropriate here, where the Commission's interpretation has received both explicit and implicit judicial approval.

D. The court of appeals' construction would seriously impede the implementation of Commission-approved transactions

The court of appeals' decision not only runs counter to the language, structure, and longstanding interpretation of the statute; it also would pose serious practical obstacles to Commission review of proposed consolidations and trackage rights transactions. The court states that the Commission "either in the approval or in a later proceeding, must reveal evidence supporting a conclusion that waiver of a particular legal obstacle is necessary to effectuate the transaction" (Pet. App. 16a n.4). But the Commission plainly cannot anticipate and reconcile all potential legal obstacles during the approval process.[27] The Commission must rely on interested parties to bring their specific concerns to its attention. And the court's suggestion that the Commission later reevaluate approved transactions to determine whether a Section 11341(a) exemption is truly necessary will result in post-approval confusion, litigation, and consequent delays. Carriers that have received approval of their

[27] Indeed, the court of appeals itself recognized (Pet. App. 16a n.4) that requiring the Commission to enumerate every legal obstacle would undermine the ICA's purpose of facilitating rail consolidations.

consolidation plans will face continuing legal challenges, thwarting implementation of transactions that have been reviewed and found consistent with the public interest.

The court of appeals' approach would also introduce an element of gamesmanship to the approval process. Under the Commission's interpretation, proponents of a transaction have a strong incentive to explain fully the terms of their proposal because the scope of their Section 11341(a) exemption extends only so far as the terms they specify. See *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696 (1958). And persons who believe that the transaction will interfere with their existing rights have a strong incentive to present timely "public interest" objections for the Commission's review. The court of appeals' decision provides, however, that an exemption may be denied if approved terms of the transaction are later determined not to be "necessary" to the transaction. The court's decision may therefore encourage parties who oppose a particular transaction to reserve their objections, based on strategic considerations, for post-approval challenge. The Commission, in turn, would be denied full input from the parties at the crucial transaction approval stage of its proceedings.

These problems are well illustrated in the present case. The Commission conducted an extensive review of Union Pacific Corporation's UP-MP-WP consolidation proposal, which involved over 22,000 miles of railroad tracks located in the western and midwestern states. Numerous parties participated, including 10 Class I railroads, 12 labor organizations, various federal and state governmental agencies and interested corporations and individuals. See *UP-Control-MP*, 366 I.C.C. at 474-482. The Commission held

hearings spanning 11 months and received testimony from over 300 witnesses. It compiled an administrative record that included over 600 hearing exhibits and over 18,000 pages of transcript. The Commission then issued a comprehensive 196-page opinion, accompanied by 12 appendices, approving the consolidation subject to various conditions, and its decision was affirmed in all relevant respects by the court of appeals.

In the course of these proceedings, MKT and DRGW filed trackage rights applications placing all participants, including BLE and UTU, on notice of their intention to conduct operations using their own crews. As previously noted, both MKT and DRGW specified within their trackage rights applications that they would retain the right to use their own crews (see note 5, *supra*). They both made clear, in subsequent written statements supporting their trackage rights and in hearing testimony, that they would crew their own trains (Pet. App. 62a-63a). And their projections of labor impacts were based on assumptions that they would use their own crews (*ibid.*).

Neither BLE nor UTU objected to MKT's and DRGW's crewing provisions at any point in the Commission proceeding (Pet. App. 62a-64a). Nor did they suggest that they have the established rights to participate in crewing decisions that they now claim. Indeed, the BLE's witness, Mr. Becker, indicated that, if the trackage rights were granted, BLE employees would be adversely affected (Pet. App. 64a-65a). And the UTU, in its post-hearing brief, relied on labor impact evidence that assumed trackage rights operations would be conducted by the tenant railroads' crews (Pet. App. 65a). Neither

BLE nor UTU objected to the crewing provisions in the subsequent judicial review of the Commission's decision. The unions did not present their objection to the crewing terms until April 4, 1983, over five months after the Commission had approved the transaction (see Pet. App. 51a).

The mechanism contemplated by Congress will only work if carriers fully describe their proposed transactions and opposing parties fully present their objections in the statutory public approval proceedings. MKT and DRGW fulfilled their obligations by seeking Commission approval of their proposed transaction terms. BLE and UTU could have objected to the MKT/DRGW crewing provisions in the original Commission proceeding. The Commission would have resolved the union claims under its "public interest" standard, taking into account "the interest of carrier employees affected by the proposed transaction." 49 U.S.C. 11344(b)(1)(D). In the absence of any objection,[28] the Commission was fully justified in approving the proposed terms. Yet under the court of appeals' decision, the unions would be permitted to raise their claims months later in a post-approval proceeding, in which the Commission would be required to evaluate the objection under a different standard: whether "termination of the asserted rights to participate in crew selection is necessary to

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[28] Contrary to the court of appeals' suggestion (Pet. App. 16a), the Commission cannot be expected to anticipate objections that the affected parties themselves fail to raise. Indeed, the union's post-approval objections in this case were unforeseeable. Judge MacKinnon's comment was that the unions' purported rights are based on the "astonishing contention" that "the unions, in effect, have a proprietary interest in the tracks of their employer" (*id.* at 29a).

effectuate the pro-competitive purpose of the grant of trackage rights" (Pet. App. 45a).

The unions' post-approval legal challenges have already created substantial and lingering uncertainty concerning the terms of UP-MP-WP consolidation, a merger initiated nearly six years ago. If the Commission is required to reevaluate the "necessity" of approved transaction terms, subject, inevitably, to further judicial review, additional delays and uncertainty will result.[29] Plainly, the court of appeals' decision opens the door to litigation that will ultimately discourage rail consolidation, impede effectuation of our Nation's rail transportation policy, and prevent the issuance of "fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. 10101a(2).

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[29] Furthermore, if the parties are ultimately required to resort to the RLA to effect changes in working conditions, either labor or management could delay indefinitely or thwart entirely the implementation of a Commission-approved transaction by refusing to agree to changes in working conditions. As we have previously noted, the Commission's plenary power to approve transactions that will result in labor rearrangements is implicitly recognized in *Norfolk & W. Ry.* v. *Nemitz*, 404 U.S. at 42-43, and is expressly articulated in *Chicago & N. W. Ry.*, 314 F.2d at 430, and *Missouri Pacific R.R.* (85-792 Pet. Add. 28a). See pages 37-40, *supra*. Indeed, the courts have concluded that regulatory agencies have the authority to resolve labor problems as necessary to ensure that approved transactions can be implemented even in the absence of an explicit statutory provision such as Section 11341(a). See note 25, *supra*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

JEFFREY P. MINEAR
Assistant to the Solicitor General

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission

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Nos. 85-792, 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

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Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY SUPPORTING PETITIONERS

JAMES V. DOLAN
PAUL A. CONLEY, JR.
MARK B. GOODWIN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

CHARLES A. MILLER
GREGG H. LEVY*
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Railroad Company and
Missouri Pacific Railroad Company

June 1986

*Counsel of Record

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BRIEF OF RESPONDENTS UNION PACIFIC RAILROAD COMPANY AND MISSOURI PACIFIC RAILROAD COMPANY SUPPORTING PETITIONERS

Respondents Union Pacific Railroad Company and Missouri Pacific Railroad Company, intervenors in the court below, submit this brief in support of petitioners' request for reversal of the decision below of the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT

Respondents Union Pacific and Missouri Pacific anticipate that the petitioners' briefs will accurately set forth the chronology of events leading to this proceeding. Accordingly, pursuant to Rule 34.2, respondents' statement will be limited to some additional elaboration necessary to put that chronology in context.

The proceedings below arise from disputes within several labor unions concerning which local's members would operate the trains of petitioner Missouri-Kansas-Texas Railroad Company ("Katy") in trackage rights service over the lines of respondent Missouri Pacific Railroad Company.[1] Respondent UTU, claiming rights purportedly based on the Railway Labor Act, complained to the ICC that its members employed by MP—rather than its members employed by the Katy—should operate Katy trains over MP's lines between Kansas City and Omaha. As the landlord carrier in these arrangements, MP was thus placed in the middle of a controversy over the selection of crews to operate its competitor's trains, a circumstance that was later aggravated by the unions' threat to strike MP over Katy's decision to operate its trains with Katy crews. See *generally Missouri Pacific Railroad Co.* v. *United Transportation Union*, 580 F. Supp. 1490 (E.D. Mo. 1984) (enjoining threatened strike), *aff'd*, 782 F.2d 107 (8th Cir. 1986) (*per curiam*), *pet. for cert. pending*, No. 85-1054.

The ICC rejected the unions' challenges. The Commission confirmed that Katy's trackage rights application, which it had approved, reflected Katy's plans to use its own crews to operate its trains. Pet. App. 62a.[2] The Commission recognized that its approval "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA." See Pet. App. 67a. Accordingly, the ICC held that,

[1] Trackage rights allow one railroad to move its trains over another railroad's tracks. Such arrangements are common in the railroad industry, and often encouraged to avoid unnecessary duplication of track by railroads serving the same locations. Using the same set of tracks, the landlord and tenant carriers traditionally maintain separate—and often competing—operations with their own employees. Here, for example, the ICC imposed a condition to the UP/MP consolidation requiring UP/MP to grant the Katy the right to operate trains over MP's lines between Omaha and Kansas City. The ICC found that such trackage rights were needed to offset perceived competitive effects of the consolidation. See Union Pacific Railroad Company—Control—Missouri Pacific Railroad Company, 366 I.C.C. 459, 566 *et seq.* (1982), *aff'd in relevant part*, Southern Pacific Transp. Co. v. ICC, 736 F.2d 708 (D.C. Cir. 1984) (per curiam), *cert. denied*, 105 S. Ct. 1172 (1985).

[2] Record references are to the Appendix to the Interstate Commerce Commission's Petition For A Writ of Certiorari, filed in No. 85-792.

notwithstanding any contrary provisions of the Railway Labor Act, Katy was authorized to select the crews to operate its trains in trackage rights service. Pet. App. 67a-68a.

In an opinion by Judge Wright, joined by Judge Mikva, the D.C. Circuit Court of Appeals reversed and remanded on the asserted ground that the ICC "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a; footnote omitted.) Accordingly, judgment was entered for the unions over a vigorous dissent by Judge MacKinnon. In a subsequent decision of the Eighth Circuit Court of Appeals addressing the same dispute, that court declined to follow the D.C. Circuit Court's holding. See *Missouri Pacific, supra*, 782 F.2d at 110 *et seq.*

SUMMARY OF ARGUMENT

The immunity afforded by the Interstate Commerce Act must be self-executing, and must apply not only to consummation of the approved transaction, but also to its implementation. Specific findings of "necessity" are not required by the statute or by its legislative history. Judicial imposition of such a requirement would be inconsistent with the national transportation policy recently affirmed by Congress, and would put at risk the public interest benefits of transactions approved by the ICC.

ARGUMENT

THE IMMUNITY AFFORDED BY THE ICC'S APPROVAL OF RAIL RESTRUCTURING TRANSACTIONS IS "SELF-EXECUTING" AND NEED NOT BE JUSTIFIED BY SPECIFIC FINDINGS

We are confident that petitioners' briefs will demonstrate (1) that the Commission adequately explained the reasoning for its decision and (2) that the immunity afforded by the Interstate Commerce Act is, in fact, necessary for implementation of the approved Katy trackage rights transaction.

We submit, however, that this Court need not and should not reach those issues. The statutory scheme—and common sense—require that the immunity afforded by the Interstate Commerce Act be "self-executing," in the sense that specific findings of "necessity" by the ICC—to which no reference is made in the statute or in the legislative history—are neither required nor prudent. Once the ICC approves a rail restructuring under the Interstate Commerce Act, the statute should immediately afford immunity to all actions taken to implement the approved transaction.[3] For that reason, the Commission's decision below (though unnecessary) was correct, and the contrary holding of the D.C. Circuit Court should be reversed.[4]

The leading case on this issue is *Kent* v. *Civil Aeronautics Board,* 204 F.2d 263 (2d Cir. 1953), in which the Second Circuit held the Railway Labor Act inapplicable to mergers approved by the CAB under the terms of the Civil Aeronautics Act.[5] *Kent* did not require specific agency findings of "necessity" to justify the immunity; it simply recognized that the agency had given "due consideration" to the conflicting interests of both groups of employees, and "provided a method which fairly distributes the burdens and benefits." 204 F.2d at

[3] The relevant history of the Interstate Commerce Act and of its relationship with the Railway Labor Act is explained in Part II of the Brief Amicus Curiae of the Association of American Railroads, to which we invite the Court's attention.

[4] The court below would limit the immunity afforded by the Act to the formal consummation of the approved transaction; in its view, the immunity was intended only "to allow transactions to occur." Pet. App. 16a. That narrow perspective is inconsistent both with the transportation policies of the Act and with the objectives of the immunity power itself. If either set of objectives is to be accomplished, the immunity must be broad enough to embrace implementation of the approved transaction, as well as its formal consummation.

[5] The Civil Aeronautics Act was similar in all relevant respects to the Interstate Commerce Act, and it included an express exemption provision like that in the Interstate Commerce Act. *Compare* 49 U.S.C. § 11341(a) (1982) with 49 U.S.C. § 494 (1952). The *Kent* court nevertheless recognized that implied immunity was necessary for realization of the public interest benefits of the approved transaction, including the "stability in air transportation that freedom from industrial strife will provide." 204 F.2d at 265. In light of the ICC's comparable implied immunity powers, this Court need not rely on the express exemption provision of Section 11341 in reversing the Court below.

266. The ICC did precisely that here; in its decision approving the Katy's trackage rights, it provided traditional labor protections, including mandatory arbitration, for employees adversely affected by the approved transaction. See *Union Pacific—Control—Missouri Pacific, supra,* 366 I.C.C. at 654.[6]

Since *Kent,* almost without exception the federal courts have held that the Interstate Commerce Commission approval of a rail restructuring affords the participants immunity from any conflicting terms of the Railway Labor Act; in none of those cases was a specific finding of "necessity" required from the agency. For example, in *Brotherhood of Locomotive Engineers* v. *Chicago & North Western Ry. Co.,* 314 F.2d 424, 432 (8th Cir.), *cert. denied,* 375 U.S. 819 (1963), the Eighth Circuit Court held that the provisions of the Railway Labor Act were displaced even though "the Commission made no express finding or order" addressing the immunity issue.

In similar circumstances, the First Circuit Court recently reached the same result, recognizing that the exemption afforded by the Interstate Commerce Act is "self-executing." *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.,* 122 L.R.R.M. 2020 (1st Cir. April 9, 1986); *Nemitz* v. *Norfolk & Western Ry.,* 436 F.2d 841, 844-46 (6th Cir.), *aff'd on other grounds,* 404 U.S. 37 (1971). *Accord, Missouri Pacific Railroad, supra,* 782 F.2d at 111-12. All of these cases are consistent with this Court's decision in *Schwabacher* v. *United States,* 334 U.S. 182, 194 (1948), which held that the only

[6] The mandatory arbitration provisions are particularly important because they ensure that labor disputes arising out of approved rail transactions cannot block the public interest benefits of such transactions or otherwise interrupt the free flow of commerce. In this respect, they are fundamentally different from the Railway Labor Act protections, which in some circumstances allow the unions to strike. Other elements of the protective conditions include generous compensatory benefits ensuring that employees dismissed or displaced as a consequence of the approved transaction continue to receive their wages for as long as six years after the transaction. These conditions have been held to satisfy the requirement of 49 U.S.C. § 11347 that carriers involved in consolidation transactions provide fair arrangements to protect the interests of their employees. *E.g.,* RLEA v. United States, 675 F.2d 1248 (D.C. Cir. 1982).

findings necessary to trigger the statutory immunity were those confirming that the approved transaction was in the public interest.[7]

The authorities cited above reach the only result consistent with common sense. The ICC could not reasonably be expected to anticipate every conceivable statutory obstacle to implementation of an approved rail restructuring. Nor could it reasonably be expected to articulate in advance the full panoply of "necessity" findings that would ensure realization of the public interest benefits of the approved transaction. Moreover, a requirement of specific, anticipatory findings would be vulnerable to exploitation by interested parties, who could refrain—as the unions did here—from bringing potential statutory conflicts to the Commission's attention during its review of the restructuring transaction.

We recognize, as did the court below, that there must be some means "to ensure that the ICC does not exceed its statutory powers." Pet. App. 17a. But, as confirmed by the unions' threat to strike over this dispute, forcing the Commission to speculate about every potential statutory conflict is not the answer to that concern. Instead, the Commission's compliance with the Act may be ensured by limiting the implied immunity power to consummation of the restructuring transaction (*e.g.*, the consolidation) and to its implementation.[8] Such

[7] City of Palestine v. United States, 559 F.2d 408 (5th Cir. 1977), *cert. denied*, 435 U.S. 950 (1978), on which the majority below relies, is not to the contrary. That case involved a railroad's attempt to abrogate in a merger proceeding a contract in which one of the merging carriers had promised "to forever maintain in Palestine 4.5% of all of its employees in certain job classifications." 559 F.2d at 412. Because that contract was "not germane to the success of" the approved merger, the Fifth Circuit held that its abrogation was not immunized by the Interstate Commerce Act. *Id.* at 414. Unlike this dispute, which unquestionably involves labor impacts resulting from implementation of an approved transaction, *City of Palestine* did not address an effort by the merged carrier to implement the approved restructuring transaction.

[8] ICC orders in this proceeding confirm that any limitation on a tenant's rights to assign its own crews could, by reducing the tenant's control over service and variable costs, undermine the competitive effectiveness of the trackage rights. See, *e.g.*, F.D. 30000, Order of November 24, 1982, at 3; Order of January 18, 1983, at 3. Thus, crew selection is unquestionably related to the trackage rights transaction, and an inherent part of its

(footnote continues)

a limitation would offer the lower courts guidance when, as in this dispute, a question is raised in a collateral proceeding as to whether immunity has been afforded by a Commission decision. Such an approach would also take full advantage of the Commission's expertise, while limiting its discretion to those areas within the scope of its statutory mandate.

The alternatives to such an approach—delaying or putting at risk the public interest benefits of an approved transaction pending *post hoc* agency proceedings—are surely inconsistent with the national transportation policy recently affirmed by Congress. See *generally* 49 U.S.C. § 10101; S. Rep. 94-499, at 2-3, 1976 U.S. Code & Ad. News at 16 (complaining of administrative merger proceedings that previously had "drastically slowed change needed in the [rail] industry").

In this dispute, the good sense of the federal district court in St. Louis and the Eighth Circuit Court of Appeals prevented such a result; both courts recognized that denying Katy and MP immunity because of the absence of specific anticipatory findings "would be tantamount to saying that [a union] has carte blanche authority to frustrate and avoid a material term of a consolidation approved by the ICC. Congress did not intend that affected employees have such power to block consolidations which are in the public interest." *Missouri Pacific Railroad Co., supra,* 782 F.2d 111-12, *affirming Missouri Pacific Railroad Co., supra,* 580 F. Supp. at 1505. If this Court affirms the decision below, there is no assurance that such wisdom will prevail in the next dispute over implementation of a rail restructuring that the ICC has deemed in the public interest.

(footnote continued)

implementation. In contrast, for example, the issue addressed in *City of Palestine, supra,* which involved a railroad's long-term commitment to maintain a small part of its work force in one city, had no demonstrable transaction-related impact.

CONCLUSION

This Court should reverse and remand the court of appeals' decision, with instructions to affirm the underlying decisions of the Interstate Commerce Commission. This Court should confirm that the immunity afforded all rail restructuring transactions by the Interstate Commerce Act is "self-executing," that such immunity does not require specific findings of "necessity" by the ICC, and that such immunity applies not only to consummation of the transaction itself, but also to its implementation.

Respectfully submitted,

JAMES V. DOLAN
PAUL A. CONLEY, JR.
MARK B. GOODWIN
Union Pacific Railroad Company
1416 Dodge Street
Omaha, NE 68179

CHARLES A. MILLER
GREGG H. LEVY*
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for Respondents
Union Pacific Railroad Company and
Missouri Pacific Railroad Company

June 1986

*Counsel of Record

(8) (9)

Nos. 85-792 and 85-793

In the Supreme Court of the United States

October Term, 1985

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS

HAROLD A. ROSS
(Counsel of Record)
JOSEPH E. PREKOP
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313
Counsel for the Brotherhood of Locomotive Engineers

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

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QUESTIONS PRESENTED

1. Do the provisions of 49 U.S.C. § 11341(a) preclude railroads participating in a trackage rights transaction from abiding by the requirements of the Railway Labor Act, 45 U.S.C. §§ 151-160, and their contractual obligations to their employees?

2. Whether any immunization from the Railway Labor Act and employee contractual obligations provided a rail carrier by 49 U.S.C. § 11341(a) must be supported by findings of necessity by the Interstate Commerce Commission, which findings specify the extent such immunization is necesssary to carry out the transaction?

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STATEMENT

This case involves a trackage rights transaction "approved by or exempted by the [Interstate Commerce Commission]" under provisions of the Interstate Commerce Act, 49 U.S.C. §§ 11341-11351, and calls upon the Court to decide whether the immunity provisions of 49 U.S.C. § 11341(a), which provide that a "person participating in that approved or exempted transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction," relieve the involved rail carriers from the Railway Labor Act and contractual obligations to their employees. If 49 U.S.C. § 11341(a) does exempt the participating carriers from those obligations, the question arises whether the Interstate Commerce Commission must make findings of necessity and must specify the extent to which the exemption is necessary to carry out the transaction.

Respondent Brotherhood of Locomotive Engineers ("BLE") is a railway labor organization, national in scope and organized in accordance with the Railway Labor Act ("RLA"), 45 U.S.C. §§ 151-160. BLE is the representative for the craft of locomotive engineers on almost all of the nation's railroads, including the rail carriers in this proceeding, Union Pacific Railroad Company ("UP"), Missouri Pacific Railroad Company ("MP"), Missouri-Kansas-Texas Railroad Company ("MKT") and Denver & Rio Grande Western Railroad Company ("DRGW").

The BLE is not a monolithic institution, for the locomotive engineers on each railroad are represented by a separate general committee of adjustment, which negotiates the working or so-called schedule agreements concerning

rules, rates of pay, and working conditions in effect on that carrier, and those agreements cover matters such as seniority and rights to runs. *See, e.g., General Committee v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 325 (1943).[1] Railroad working agreements are extensive and also are "intricate and technical," and require a perusal of "usage, practice and custom" to properly understand them. See *Order of Railway Conductors v. Pitney*, 326 U.S. 561, 567 (1946). In the past several decades, however, national bargaining has taken place between the International BLE and the National Railway Labor Conference, as the representative for most of the nation's Class I railroads in national handling of certain issues, so that the rates of pay for engineers on MP, MKT and DRGW are similar.

A. Historical Background

As petitioners perceive, a review of the historical background of section 11341(a) is necessary to resolve this case. However, petitioners' summary of that history is restrictive and, in limiting itself to the congressional policy to eliminate redundant rail facilities through consolidations, serves to distort the congressional intent regarding application of the RLA and continuation of collective bargaining rights. Moreover, unless one looks at the employee protections accompanying that history, the dilemma confronting the respondent unions in 1982 and 1983 is not disclosed.

Although section 11341(a) had its origin in the Transportation Act of 1920, Pub. L. No. 66-152, ch. 91, § 407(8), 41 Stat. 456, 482 (1920), the first provision for the protection of railroad employees appears in the Emergency Rail-

1. Standing Rule 33(a) of BLE's Constitution states: "The General Committee of Adjustment shall have full power to settle all questions of seniority and rights to runs and jurisdiction of territory that are presented to it. . . ."

road Transportation Act of 1933 ("ERTA"), Pub. L. No. 68, ch. 91, Sections 1-17 and 209, 48 Stat. 211-217 and 221 (1933). The ERTA, among other things, provided for the appointment of a Federal Coordinator of Transportation who was given the duty of preventing unnecessary duplication of services and facilities. Containing the first recognition by Congress of the principle of employee protection against the adverse effects of mergers, Section 7(b) of ERTA provided, in part, a formula below which employment levels could not fall in a given year and that no "employee be deprived of employment such as he had during said month of May [1933] or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title." (48 Stat. 214).[2]

The ERTA also provided for various studies to promote the purposes of the Act. In his 1934 Report to Congress, the Coordinator, Commissioner Joseph B. Eastman, examined the issue of which employees should be retained as a result of reductions in labor requirements by consolidations. H. R. Doc. 89, 74th Cong., 1st Sess. (Jan. 30, 1935). Commissioner Eastman noted these adjustments were difficult and often were "accompanied by much bitterness and disappointment, which in turn . . . seriously affected the morale of the employees concerned and the service rendered by them." *Id.*, 89. He also suggested

2. Section 7(d) directed the Federal Coordinator to require the railroads to compensate employees for financial losses caused by reason of moving to follow their work when transferred under authority of the statute:

> The Coordinator is authorized and directed to provide means for determining the amount of, and to require the carriers to make just compensation for, property losses and expenses imposed upon employees by reason of transfers of work from one locality to another in carrying out the purposes of this title.

that a simple formula of employee selection based on seniority be legislated. This proposal was never acted upon, for as one commentator has stated, "Any necessity for such action was averted by the national railroad labor organizations, which demonstrated adequate capacity to intervene effectively in these seniority disputes." Kahn, *Seniority Problems in Business Mergers*, 8 INDUSTRIAL AND LABOR RELATIONS REVIEW 361, 366 (1954).

The various unions adopted constitutional provisions that list the considerations to be observed in allocating the work and the procedures to be followed selecting the employees to perform that work. *Id.* Generally, these constitutional principles grant the employees involved in transfers, consolidations, coordinations, abandonments, and other railroad financial transactions the right to follow their positions or work with their seniority rights. *Id.*, 371-372.[3]

The effective period of the ERTA was extended by proclamation of President Roosevelt to June 17, 1936, at which date it expired. On May 21, 1936, at the request of the railroad labor organizations and as the result of substantial government pressure, an agreement was signed by the unions and most of the nation's carriers, which is commonly referred to as the "Washington Job Protection Agreement ("WJPA" or "Washington Agreement"). *Id.*

3. BLE's Constitution contains comprehensive provisions concerning questions as to seniority and rights to runs arising from mergers, consolidations, coordinations, controls, absorptions, diversions of traffic, purchases or any other action whereby separate facilities or operations of railroads are going to be unified. BLE Constitution, Standing Rules 34-37 (1981). In general, the organic law specifies that "the engineers on the road, or roads, or any portion thereof, affected thereby, shall retain their right and seniority, as heretofore, on the roads absorbed, traffic diverted, consolidated, merged, leased or coordinated; but the runs shall be manned by the engineers of the respective roads in proportion, as near as practicable to the car miles or train miles in road service and to the engine hours or inbound car count in yard service, in the territory involved on each road."

This document, which is still in effect, provides for certain monetary allowances for dismissals and displacements resulting from "coordinations." See appendix in *St. Joe Paper Co. v. Atlantic Coast Line R.R.*, 347 U.S. 298, 315 (1954) for text of WJPA. Section 2(a) defines "coordination" as "joint action by two or more carriers whereby they unify, consolidate, merge or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities." Section 4 of the WJPA requires "each carrier contemplating a coordination to give at least ninety (90) days written notice of such intended coordination," and section 5 provides "for the selection of forces from the employees of all carriers involved" and their assignment necessitated by the coordination "on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto."[4]

In sum, the WJPA provides some measure of financial protection to employees adversely affected by displacements or dismissals as a result of a "coordination" and through the notice and negotiation provisions a means of protecting the affected employees in their seniority rights and places and types of work.

4. Until this case, the Interstate Commerce Commission had concluded that the WJPA was the foundation for the Commission formulated employee protections and that its provisions had been embodied therein:

> Beyond doubt, the Washington Agreement was the foundation upon which all employee protective plans have been constructed. It was the basis for the legislation from which evolved section 5(2)(f). And in framing the conditions to be imposed in this proceeding, we relied upon our holding in the *New Orleans Case* that imposition of the provisions of the Washington Agreement, subject to limitations discussed therein, would provide the fair and equitable arrangement commanded by the statute.

Southern Ry. - Control - Central of Georgia Ry., 331 I.C.C. 151, 164 (1967).

Although Title I of the ERTA expired, the merger provisions of the Transportation Act of 1920 continued in effect. Section 5(4) of the Interstate Commerce Act, which was added by the 1920 Act, Pub. L. No. 66-152, ch. 91, 407(4), 41 Stat. 456, 481, and amended by the ERTA, provided that the ICC could authorize consolidations "upon the terms and conditions and with the modifications so found to be just and reasonable." In *United States v. Lowden*, 308 U.S. 225, 234 (1939), this Court affirmed the Commission's power to impose employee protections as "just and reasonable" conditions in the public interest, and said:

> One must disregard the entire history of railroad labor relations in the United States to be able to say that the just and reasonable treatment of railroad employees in mitigation of the hardship imposed on them in carrying out the national policy of railway consolidation, has no bearing on the successful prosecution of that policy and no relationship to the maintenance of an adequate and efficient transportation system.

While the Transportation Act of 1940, Pub. L. No. 785, ch. 722, 54 Stat. 899 (1940), liberalized the consolidation and merger provisions of the Interstate Commerce Act, Congress, which was thoroughly aware of the effects on railroad employees, added section 5(2)(f) and for the first time specifically required the protection of railroad employees affected by transactions, *i.e.*, mergers, consolidations, acquisitions of control, leases, and acquisitions of trackage rights.[5]

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5. Section 5(2)(f) [which, as amended, is now 49 U.S.C. § 11347] provides:

> As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad

(Continued on following page)

Subsequently, the Commission held that it could not impose employee protective conditions in abandonment proceedings. This Court, however, affirmed the decision of the district court that the Commission had this power in the "public convenience and necessity", which concept was as broad as the "public interest" phrase used in the Transportation Act of 1920, and stated in regard to labor protection:

> [I]f national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded. On the contrary, the *Lowden* case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system.

Footnote continued—

> subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

The Transportation Act of 1940, Pub. L. No. 785, ch. 722, § 7, 54 Stat. 899, 906-07 (1940).

Interstate Commerce Commission v. Railway Labor Exec. Ass'n., 315 U.S. 373, 377 (1942).

The process then began by which the Commission developed the employee protective conditions imposed by it. At first the Commission reserved jurisdiction to consider the protections to be imposed if it was later informed that the employees had actually been affected adversely. *Minneapolis & St. L. R.R. - Reorganization*, 244 I.C.C. 357 (1941). In 1944, the Commission detailed five conditions intended to protect employees in a purchase for a period of four years from the effective date of its order. *Oklahoma Railway Trustees - Abandonment of Operations*, 257 I.C.C. 177 (1944). Later, the Commission took the position that the four years was a maximum and employees first adversely affected after that period would have no protection, but this Court, in reversing that decision in *Railway Labor Exec. Ass'n. v. United States*, 339 U.S. 142, 155 (1950), concluded from a reading of the legislative history of section 5(2)(f):

> The Commission has the power to require a fair and equitable arrangement to protect the interests of railroad employees beyond four years from the effective date of the order approving the consolidation.

Upon remand, the Commission, in promulgating the so-called *New Orleans* conditions that subsequently were imposed in numerous cases, said: "From the beginning we have patterned the conditions which we have prescribed after the Washington Agreement." *New Orleans Union Passenger Terminal Case*, 282 I.C.C. 271, 280 (1952).

This rationale was reaffirmed in a decision on remand in *Southern Ry. - Control - Central of Georgia Ry.*, 331 I.C.C. 151, 164 (1967). More importantly, the Commission

expressed its views—at that time at least—that it did not have authority to supersede collective bargaining agreements; the employees' rights under those agreements were independent of any rights they had under the Commission approved conditions; the Commission conditions applied "after the carriers have arrived at their adjustments of the labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect" (citing *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962)); and the transportation and labor laws were to be accommodated. *Id.*, 168-170.

In enacting the Rail Passenger Service Act of 1970 ("RPSA"), Pub. L. No. 91-518, 84 Stat. 1327 (1970), the Congress provided for employee protection upon the transfer of passenger services from the railroads to the National Railroad Passenger Corporation (AMTRAK).[6] Section 405(a) of RPSA, 45 U.S.C. § 565(a), provides that "a railroad shall provide fair and equitable arrangements to protect the interests of employees affected by discontinuance of intercity rail passenger service," and section 405(b), 45 U.S.C. § 565(b), requires that those protective arrangements include provisions for:

> (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;
>
> (2) the continuation of collective bargaining rights;

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6. The language was taken from section 10(c) of the Urban Mass Transportation Act of 1964, Pub. L. No. 88-365, 78 Stat. 302, 307 (1964), subsequently renumbered as section 13(c), Pub. L. No. 89-562, Sec. 2(a)(1), 80 Stat. 715. *See* 49 U.S.C. § 1609(c).

(3) the protection of individual employees against a worsening of their positions with respect to their employment; * * *.

The Secretary of Labor prepared a set of protective conditions and certified its compliance with 45 U.S.C. § 565(b). *See Congress of Railway Unions v. Hodgson,* 326 F. Supp. 68 (D. D.C. 1971).

Subsequently, section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 62, amended section 5(2)(f) of the Interstate Commerce Act [now 49 U.S.C. § 11347], by including the following sentence:

> Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to [section 5(2)(f) of this act] and *those established pursuant to section 405 of the Rail Passenger Service Act* (45 U.S.C. 565). (Emphasis supplied).[7]

After several years following the 1976 amendments and many Commission proceedings, the ICC fashioned conditions for use in abandonment cases in *Oregon Short Line R.R. - Abandonment - Goshen,* 360 I.C.C. 91 (1979); in merger, control and consolidation cases in *New York Dock Ry. - Control - Brooklyn Eastern District Terminal,* 360 I.C.C. 60 (1979), *aff'd sub nom. New York Dock Ry. v. United States,* 609 F.2d 83 (2d Cir. 1979);[8] and in trackage

7. The 1976 Act also made imposition of similar employee protective conditions in abandonments mandatory. 49 U.S.C. § 10903(b)(2).

8. In *New York Dock Ry. v. United States,* the Second Circuit found the unions' historical treatment of labor protective arrangements more persuasive than those advanced by the amicus American Association of Railroads. ("AAR") 609 F.2d *supra* at 93, n.11.

rights cases in *Norfolk and Western Ry. - Trackage Rights - BN,* 354 I.C.C. 605 (1978), *as modified by Mendocino Coast Ry. - Lease and Operate - California R.R.,* 360 I.C.C. 653 (1980), *aff'd sub nom. Railway Labor Exec. Ass'n. v. United States,* 675 F.2d 1248 (D.C. Cir. 1982).

These conditions contain the notice and negotiation sections of the WJPA and the *New Orleans* conditions, much of the protection formulated by the Secretary of Labor under 45 U.S.C. 565, and the following prohibition against interference with RLA and contractual obligations:

> 2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

See 360 I.C.C. at 84, 99.

On October 14, 1980, Congress enacted the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895. Though significantly deregulating the railroad industry, Congress continued to provide for the protection of employees in regard to every action where they could be affected. *See e.g.,* 49 U.S.C. § 10505(g) ("Commission may not exercise its authority under this section . . . (2) to relieve a carrier of its obligation to protect the interests of employees as required by this subtitle"); 49 U.S.C. §§ 10910, 11123(a)(3) ("Commission shall require to the maximum extent practicable the use of the employees who would normally have

performed work in connection with the traffic subject to the action of the Commission").[9]

B. The Instant Dispute

On September 15, 1980, UP, MP and several other corporations filed applications with the ICC for authority under 49 U.S.C. §§ 11343 and 11344 to form a railroad system covering a substantial portion of the country west of the Mississippi River. The applications were opposed by a number of persons, including petitioner MKT, DRGW and the respondent unions, BLE and United Transportation Union ("UTU"). DRGW and MKT later filed responsive applications seeking trackage rights. In its application for trackage rights over various UP and MP tracks, including Kansas City and Omaha, MKT proposed using its own employees in operations. J.A. 164. DRGW, on the other hand, set out that it "'may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars'" over MP tracks. J.A. 165. In fact, Mr. A. H. Nance testified for DRGW before the ICC that DRGW would be "willing to sit down and work out any kind of arrangement you [UP-MP] want." J.A. 166.

On October 20, 1982, the Commission entered its decision approving the primary applications, subject to various conditions. *Union Pacific - Control - Missouri Pacific R.R.*, 366 I.C.C. 462 (1982), *aff'd in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1172 (1985). One

9. Although railroad employment stood at 1,226,421 in 1952, when the *New Orleans* conditions were fashioned, it dropped to 458,994 in 1980, when the Staggers Act took effect, and has further declined to 301,879. 1985 *Moody's Transportation Manual* page a29; ICC Bureau of Accounts A-300 Report for 1985. Though the consolidations may have resulted in a more efficient rail transportation system, they have not preserved jobs for rail labor as suggested by the amicus AAR (AAR Brief, p. 12).

of the conditions imposed was that MP and UP had to grant DRGW the right to operate over 619 miles of MP trackage from Pueblo, Colorado to Kansas City, Missouri, 366 I.C.C. at 572. Another condition was that MKT, among other things, was to be given the right to operate over MP tracks from Kansas City to Omaha and from Union, Nebraska to Lincoln, Nebraska, and also over UP tracks from Omaha to Council Bluffs, Iowa, a distance over 200 miles. 366 I.C.C. at 465.

As MP and UP had opposed the trackage rights requests of MKT and DRGW, the Commission did not have actual agreements before it when considering those applications. Therefore, the ICC decided:

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreements wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

366 I.C.C. at 589.

Several other items were left unsettled, including revision of MKT's operating plan as unrealistic (*id.* at 569).[10]

10. The ICC suggested that MKT revise its plan "to provide for service using two crews with the crew change occurring at an appropriative point between Kansas City and Omaha. Although operations using two crews would be more costly than using one crew, such operations appear feasible and could prevent operating problems relating to hours of service laws." This quotation points out that, at that time, the Commission did not consider 49 U.S.C. § 11341(a) as automatically immunizing MKT from the Hours of Service Act, 45 U.S.C. §§ 61-66, and other federal safety laws.

Other than this comment, the Commission made no reference to and cannot be viewed as having considered and decided that MKT or DRGW engineers should operate the trains over UP-MP tracks (*see* 366 I.C.C. 568-569, 572-578). In fact, the Commission's opinion is totally silent on crew selection. At several places in its opinion, the Commission discloses the criteria (*id.*, 562-565) and the monetary considerations upon which it bases its granting of various trackage rights (*id.*, 589-590). But, nowhere can one find any reference to crew manning by the Commission.

Although, as petitioners state, the unions, including BLE and UTU, may not have directed their challenges specifically to the subject of which crews would man the trackage rights trains, they did seek modification and expansion of the customarily imposed conditions due to the anticipated magnitude of the labor impacts and the time period they would cover. In response to the unions' arguments, the Commission said (*id.*, 621-622):

> As is our usual practice, we will impose the conditions specified in *Norfolk and Western Ry. Co. - Trackage Rights - BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc. - Lease and Operate*, 360 I.C.C. 653, 664 (1980) on the trackage rights approved as part of the primary application.[138] Similarly, in the DRGW, SP, and MKT responsive trackage rights applications which we are approving, . . . we find that employees will be adequately protected by imposition of protective conditions specified in *NW-BN*, as modified in *Mendocino*. *Railway Labor Executives Ass'n. v. United States*, 675 F.2d 1248 (D.C. Cir. 1982).

138. The *NW-BN-Mendocino* conditions are similar to the *New York Dock* conditions, but are applied in the context of trackage rights proceedings. The imposition of these conditions here is a matter of consistency but has little practical significance, since *all affected employees of applicants will also be covered by the New York Dock conditions imposed on the primary transaction.* (Emphasis supplied).

Clearly, on October 20, 1982, the ICC did not view its order as decisive of labor relations matters, and did not indicate that it had ruled on crew assignments.[11]

Both sets of employee protection conditions imposed required the rail carriers to which they related to preserve all "rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . under applicable laws and/or existing collective bargaining agreements or otherwise. . . ." 354 I.C.C. at 610; 360 I.C.C. at 84. Further, as previously explained, both sets of conditions require advance notice of the transaction to all "interested employees" and their employee representatives and negotiation of an agreement to provide for, among other things, "the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case. . . ." *See,* Article I, Section 4 of the *New York Dock* conditions, 360 I.C.C. at 85; and *Norfolk & Western* conditions, 354 I.C.C. at 610.

None of the carriers involved (MP, MKT or DRGW) gave the MP locomotive engineers represented by BLE

11. As a final note on labor protection, the Commission rejected two conditions raised by the American Train Dispatchers Association, one of which requested an order providing that "no transfer of [Western Pacific] or MPRR train dispatching work, or transfer of certain train dispatchers be accomplished without further order of the Commission after notice and opportunity for a hearing." The Commission rejected the imposition of a notice and hearing requirement as "unduly burdensome" and held "in the event employees might be impacted in the future, as a result of this consolidation, they will be afforded the protections we have imposed here."

the advance notice prescribed by the employee protective conditions. On November 5, 1982, DRGW entered into a stipulation with the UP-MP "setting interim compensation terms and providing for the applicants to provide operating assistance to DRGW in implementing the trackage rights." J.A. iii, No. 22, Decision in Finance Docket No. 30,000 (Sub-No. 18). Thereafter, DRGW began its trackage rights operations over MP tracks with MP crews manning its trains. J.A. 6. In early January 1983, MKT began to perform the trackage rights operations under an agreement in principle reached with UP-MP in November 1982. J.A. 74. Unlike DRGW, however, MKT used its own employees.

On February 1, 1983, MP advised its engineers represented by BLE of the trackage rights granted DRGW between Pueblo, Colorado, and Kansas City, Missouri and, for the first time, informed them that "MP and D&RGW have entered into an agreement that provides for using MP crews on D&RGW trains for a temporary, interim period, after which they will operate the trains with their crews." *Id.* After pointing out that at some point DRGW planned to have sufficient tonnage to run trains consisting of their own tonnage, MP stated:

> The exact date D&RGW will start using their crews on their trains is not known at this time. However, when D&RGW lets us know when they will start manning their trains, we will give you this information.

Id.

BLE then protested the use of DRGW and MKT crews on MP trackage on the ground that DRGW and MKT engineers did not have the right to operate trains over

MP trackage and that the agreements between the railroads resulted in an unauthorized change of working conditions in violation of the RLA. The railroads took the position that the Commission's order required the use of DRGW and MKT crews.

Unknown to BLE, the respondent UTU had threatened to strike MP for allowing MKT crews to operate trains over MP tracks, and MP obtained a strike injunction on March 30, 1983. *Missouri Pacific R.R. v. United Transportation Union*, 580 F. Supp. 1490, 1507 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107, 110 (8th Cir. 1986), *petition for cert. filed*, 54 *U.S.L.W.* 3463 (U.S. Dec. 18, 1985) (No. 85-1054).

Shortly thereafter, on April 4, 1983, BLE filed a Petition for Clarification with the ICC in which it asked the Commission to clarify its October 20, 1982 decision as to crew manning. BLE pointed out that its understanding of the situation was reached from recent communications from MP that the ICC order mandated use of the DRGW and MKT crews. BLE noted that the protections imposed by the ICC did not require the tenant lines to use their employees to operate the trains or "even purport to treat with this subject." J.A. 4.

BLE stressed that interpreting the protections as mandating the use of DRGW and MKT crews "would be contrary to the purposes of the Interstate Commerce Act" by leading to "payment of displacement and dismissal allowances to MP crews who would be needlessly affected by the transaction by the hiring of new employees to perform this work" and by payment of removal allowances to employees of DRGW and MKT required to transfer, "thereby reducing the economics and efficiencies con-

templated by the Commission's approval of these transactions." J.A. 4. Moreover, BLE asserted that the Commission did not have jurisdiction over crew assignments and manning of positions, a holding that the Commission had historically applied in numerous previous decisions. J.A. 4.

The Commission denied BLE's petition in an order served on May 18, 1983. In that decision, the Commission concluded: "The consolidation decision does not require clarification." Pet. App. 53a. To the Commission, BLE was "attempting to reargue an issue that has already been decided." Pet. App. 54a. In sum, the Commission held that it had jurisdiction of crew assignments and manning of positions and that it naturally followed that DRGW and MKT could use their own crews.

On May 31, 1983, BLE filed with the ICC a "Petition for Reconsideration" of its May 18 order, J.A. 48-54. BLE stated that the Commission had "failed to consider its prior precedent on the issue which unequivocally hold that the subject of crew assignments and manning are labor disputes to be adjusted under the procedures of the Railway Labor Act." J.A. 49. In addition, BLE contended that "the Commission's ruling contravenes Section 2 of Article I of the New York Dock protective conditions imposed by the Commission in this docket and thereby is not in accord with the statutory mandate set forth in 49 U.S.C. 11347." *Id.*

Indicating the decision authorizing use of the lessee railroad's crews was contrary to the policy set forth in the Interstate Commerce and Railway Labor Acts, BLE made the following conclusion and prayer for relief:

> In sum, the Brotherhood of Locomotive Engineers submits that the Commission does not have jurisdiction over these labor disputes since such matters are within the purview of the Railway Labor Act, and respectfully requests that the Commission grant this petition for reconsideration and issue an order holding that crew assignments and manning of positions are matters not within the jurisdiction of the Commission but are labor disputes to be resolved under the procedures of the Railway Labor Act.

J.A. 54.

On June 7, 1983, UTU also petitioned ICC for reconsideration of its May 18, 1983 order, J.A. 71-84. UTU asked the ICC to rule that its order had not relieved any railroads from their obligations under the Railway Labor Act or the conditions imposed to protect the interests of the railroad employees.

The Commission denied the petitions for reconsideration on October 25, 1983. Pet. App. 60a. The ICC held that it had jurisdiction under 49 U.S.C. § 11341(a) to exempt a transaction approved under 49 U.S.C. §§ 11343 and 11344 from the provisions of the Railway Labor Act. Pet. App. 54a. Having found the power to exempt, the Commission then held that the exemption automatically flowed from its order:

> The terms of section 11341 immunizing an approved transaction from other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is expressly relieved from certain restraints.

Pet. App. 60a.

In December, 1983, BLE and UTU filed with the District of Columbia Circuit petitions for review of the ICC's orders of May 18, 1983 and October 25, 1983. Among other things, the unions argued in their petitions that the ICC exceeded its authority by exempting the carriers from the requirements of the Railway Labor Act in regard to crew selection and assignments and that this action contravened the employee protection requirements of 49 U.S.C. § 11347 and the *N&W* conditions imposed in the ICC's approval of the trackage rights applications of DRGW and MKT pursuant to Section 11347.

On May 3, 1985, the Court of Appeals in a 2-1 decision vacated the ICC's decision, stating:

> We thus vacate the 1983 orders and leave the parties to their Railway Labor Act remedies. In doing so we intimate no view on the merits of the unions' claims about their underlying right to a role in crew selection. The Railway Labor Act is designed to resolve such issues, and we leave the parties to the mechanism created by Congress.[10]

10. The dissent professes some puzzlement at the reason for vacating the ICC decisions. The reason is clear. This issue belongs within the structure created by the Railway Labor Act. Holding so does not assume "a conflict between the approved crew selection provisions and the unions' asserted rights." Dissent at 8. Rather, it leaves that question to the mechanisms created by Congress. That, of course, is the reason we do not "indicate what the parameters of the unions' claimed rights might be," id.: under the statutory scheme, it is not, at this point, our province to do so. All we decide is that ICC's claimed exercise of exemption authority was insufficient to immunize crew selection from the provisions of the Railway Labor Act.

Pet. App. 21a. The dissent, on the other hand, accepted the Commission's argument that the exemption from the Railway Labor Act was self-imposed by reason of 49 U.S.C. § 11341.

Subsequently, the Commission and the affected railroads petitioned for rehearing with suggestion for rehearing en banc. On July 12, 1985, the panel *sua sponte* amended its opinion so as to delete footnote 10, *supra*, and to modify the concluding paragraph of the majority opinion so as to remand the proceeding to the Commission. According to the majority of the panel of the Court of Appeals (Judges Wright and Mikva), the Railway Labor Act dispute resolution procedures may not be dispensed with by the ICC without an adequate finding of necessity for doing so, and the Commission had never given a reasion for removing crew selection from the Railway Labor Act bargaining process, Pet. App. 45a.

The petition for rehearing and suggestion for rehearing en banc were denied by the court below in orders dated August 9, 1985. Pet. App. 48a-50a. On March 24, 1986, this Court granted the petitions of the ICC and MKT for writs of certiorari to the District of Columbia Circuit Court of Appeals.[12]

SUMMARY OF ARGUMENT

Although rights to runs and crew assignments are vital to the livelihood of railroad operating employees, as demonstrated by decades of prior practices in the rail industry, Commission imposed crew requirements have not been and are not now essential to effectuation of a Commission approved transaction. Over the years there has been little controversy between the operating employees and their carriers as to the selection of the employees operating the

12. The cross-petitions of BLE and UTU for certiorari are pending. (Nos. 85-983 and 85-997).

trains following consolidations or other ICC approved transactions, and there have not been any interruptions to commerce resulting from those issues. As a result, the Commission has not intervened in crew selection matters and, in fact, has professed lack of jurisdiction and expertise in these and other collective bargaining items. *Southern Railway - Control - Central of Georgia Ry.*, 331 I.C.C. 151, 170 (1967); *Illinois Central Gulf R.R. - Trackage Rights - Chicago & Illinois Midland Ry. Co.*, Finance Docket No. 28046 (Feb. 15, 1977). J.A. 7-8.

While the Commission's authority may be broad, it is not unbridled. *Northern Lines Merger Lines*, 396 U.S. 491, 503 (1970). The decision question must be answered with substantial evidence, and the Commission must reveal the standards it employed in reaching that decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196-197 (1947). Here, the Commission "never offered a word about waiving the Railway Labor Act with respect to the crew assignment in the trackage rights, much less the necessity for doing so" in its 1982 consolidation opinion. Pet. App. 19a. And while in its 1983 decisions arising from BLE's petition for clarification the ICC claimed that section 11341 had automatically relieved the carriers from their RLA and collective bargaining obligations upon issuance of its order approving the consolidation, the Commission never gave any justification for its new interpretation or for the change in its policy related to crew assignments and other collective bargaining matters, as it was required to do (*see NLRB v. Local Union No. 103, Int'l. Ass'n. of Bridge, Structural and Ornamental Iron Workers*, 434 U.S. 335 351 (1978)), nor did the Commission "give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the RLA," or the

notice and negotiation provisions of its own employee protective conditions. Pet. App. 19a.

In addition to the fact that the Commission has never considered crew assignment a subject to be decided by it and, therefore, has never taken evidence upon the economic aspects of such selection, no opportunity exists today for the Commission to hear and decide the issue in almost all cases. Except when part of a responsive application in a consolidation proceeding under sections 11343 and 11344, trackage rights transactions are handled under exemption procedures, which merely require the person engaging in the transaction to file a notice. *See, e.g.*, 49 C.F.R. § 1180.2 *et seq.*

Moreover, though the Commission and the MKT claim that the employee protective conditions imposed by the Commission pursuant to 49 U.S.C. § 11347 give the affected employees monetary protection from the adversities arising from the unilateral labor relations decisions made by the carriers by reason of the self-executing exemption allegedly contained in 49 U.S.C. § 11341, the Commission has taken further actions that, in some instances, deprive the employees of that protection which it argues serves as the basis of the exemption. *See, e.g., Simmons v. ICC*, 766 F.2d 1177 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 791 (1986), which upheld an order of the ICC refusing to impose labor protective conditions upon a rail carrier that applied to abandon a line of rail and then sold it.

Thus, the reading of the language contained in section 11341(a) is extended too far by the Commission when it goes beyond the clear meaning of the wording that the transaction is exempt "from all other law . . . *as necessary to let that person carry out the transaction.*" (Emphasis

supplied). At no time or place has the Commission informed anyone as to why crew assignments in trackage rights cases in general and in this case in particular may not be negotiated and why that labor relations matter has been exempted from the procedures of notice and negotiation under the RLA. The Commission did not so find, and the courts should not accept later rationalizations for its actions. *See Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962).

Moreover, the Commission's actions were defective in never having attempted to accommodate the provisions of the ICA and RLA. *Id.* at 172. Since the Commission-formulated employee protective conditions provide for notice and negotiation, and to that extent are no different than the procedures of section 6 of the Railway Labor Act, 45 U.S.C. § 156, the two Acts can be accommodated. *See* 354 I.C.C. at 610-611; 360 I.C.C. at 85.

With respect to the RLA, however, it appears to be beyond question that Congress has not manifested any intention to abrogate that Act. *Schwabacher v. United States*, 334 U.S. 182 (1948). Every amendment of the ICA, while providing carriers the opportunity to more easily obtain certain economies and efficiencies, has carried with it employee protections which embody the preservation and continuation of collective bargaining rights and the rates of pay, rules and working conditions in effect. At each stage of the historical development of the ICA, the protection of employees has been considered and broadened. Therefore, one cannot conclude, as the Commission suggests, that Congress manifested an intention to abrogate the RLA insofar as Commission approved or exempted transactions, when it has specifically provided

for the continuation of the collective bargaining rights, the employment rights and the statutory rights of rail workmen at various points of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (Oct. 14, 1980), and other railway legislation. In sum, those actions are not indicative of a congressional policy intended to deprive employees of a voice in the process of determining which persons may run the trains engaged in Commission approved trackage rights operations.

This Court in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), warned the ICC not to contravene the national policy as to labor relations or to invade the authority of the agencies given that jurisdiction. And in *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330, 339-340 (1960), the Court confronted with a similar kind of argument by the railroads said: "There is no express provision of law, and certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs."

The RLA has long served as the basis for labor management harmony and industrial peace in the railroad industry. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 379 (1969). Although arguments have been advanced to substitute compulsion and anti-strike measures in place of the RLA, the RLA and its promotion of collective bargaining have been "thought essential by Congress" in the operation of an efficient interstate rail system. *See United Transportation Union v. Long Island R.R.*, 455 U.S. 678, 688-689 (1982).

ARGUMENT

THE COMMISSION MUST ENTER FINDINGS OF NECESSITY IN ORDER TO RELIEVE A CARRIER FROM ITS RAILWAY LABOR ACT AND CONTRACTUAL OBLIGATIONS TO NEGOTIATE UPON CREW MANNING ISSUES WITH ITS EMPLOYEES.

The Court of Appeals correctly held that the Commission's approval of a transaction under section 11344 of the ICA is insufficient to exempt a rail carrier from its obligations under the RLA and its labor contract unless the ICC gives a reasoned explanation why crew selection is so essential to the " 'pro-competitive' purpose that the otherwise applicable provisions of the Railway Labor Act must be waived." Pet. App. 19a-20a & n.8. Consistently in the years prior to the time that the involved applications were approved and BLE filed its petition for clarification, the ICC had rejected any jurisdiction over crew manning and denied having any expertise in labor relations matters. Moreover, the employee protective conditions specifically required the existing rates of pay, rules and working conditions set forth in the collective bargaining agreements be maintained until changed by agreement or applicable statute, and contained a notice and negotiation procedure for the selection of work forces. In addition, the Commission had rejected evidence on the items that it now asserts BLE and UTU failed to present proof. Accordingly, BLE assumed—we submit appropriately—that the ICC would not change its mind—at least not without some notice and sufficient reasons for its new interpretation—and would through clarification of its order of October 20, 1982, inform the parties of the procedures available to determine crew manning.

Under well-established principles, the ICC was required to make a specific finding that the exemption from the RLA and existing collective bargaining agreement provisions was necessary and to provide sufficient reasons for that determination.[13]

In addition, the holding below was consistent with all legal precedent. Furthermore, until the briefs were filed herein, the Commission never attempted to justify its position that a self-executing exemption from the RLA is required and that any procedure for employee participation, whether under the RLA or the Commission imposed conditions, would hinder the consolidation. In fact, by reason of the Commission's newly promulgated class exemption procedures—and its refusal to prescribe protective conditions in many instances—there is no forum to "decide"

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13. The Government argues in a footnote (see Govt. Brief, p. 22, n.16) that the Court of Appeals improperly expanded the scope of its review, because (a) the unions' petitions for review were timely only for the purpose of reviewing the Commission's denial of BLE's petition for clarification, and (b) the unions failed to present any evidence before the ICC that the UP-MP employees "have rights under collective bargaining agreements to participate in the trackage rights crew selection." However, as the court below appropriately held (Pet. App. 12a), based upon precedent in these matters and the "ICC's general pronouncement that the labor protective conditions would not be violated," the issue of crew assignment under those labor protection conditions "did not become ripe for review until the Commission had specified that crew selection was exempt from all otherwise applicable legal requirements." This issue cannot be conceivably related to the Commission's final consolidation decision as suggested by the Government. As to the suggestion that the unions failed to present evidence of collective bargaining rights, we note that (1) the Commission generally would not accept that evidence as significant, (see *infra*, at 28-33); (2) the Commission in giving short shrift to BLE's petition did not consider the labor contract's provisions as relevant in this case; and (3) it is implausible that anyone with knowledge of seniority rights and contracting out cases replete in the labor relations authorities would not be on notice that labor agreements contain clauses providing, *inter alia*, for seniority and performing the employer's work. (*infra*, at 41-42).

crew questions and, therefore, no basis for an automatic exemption under section 11341 in any event.

A. The Commission Has Consistently Excluded Itself From Participating In Or Deciding Labor Relations Matters.

As early as 1952, the ICC in *Gulf, M. & O. R.R. Abandonment,* 282 I.C.C. 311, 331-32 (1952), claimed: "This Commission, over a long period of years, has uniformly held that it has no power to reform contracts or to relieve carriers of their financial obligations thereunder * * *." In this connection, the Commission continued:

> The applicant fails to draw the distinction between conditions which affect only the applicant and give it the alternative of doing one thing or another, and conditions which would impair State laws or vested rights of the parties. The latter we may set aside only upon a clear grant of authority similar to that contained in Section 5(11) [now 49 U.S.C. §11341].
>
> * * * [W]e are of the opinion that we are not authorized by order to declare that the obligations created by the contract between the applicant and the Illinois Central are set aside other than to the extent necessary to effect a compliance with our certificate * * *.

Id., 335.

Subsequently, in *Southern Railway - Control - Central of Georgia Ry.*, 331 I.C.C. 151, 170 (1967), the Commission expressed the view that the exemption granted by section 11341 did not extend to those proposals before the ICC which dealt with the applicant's intention concerning rail labor. As to the employees' contractual rights, including work rights, the Commission concluded:

> By its terms, section 5(11) applies only to anti-trust and other restraints of law from carrying "into effect the transaction so approved * * *." Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms * * *.
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law * * *.

From this foundation, the ICC, prior to this case, consistently refused to become involved in labor matters. For example, in *Leavens v. Burlington Northern, Inc.*, 348 I.C.C. 962 (1977), a case involving an attack by an individual employee on the protective conditions resulting from a merger which had been agreed to by the union and the railroad, the Commission explained:

> The Commission did not intend to place itself in the fields of collective bargaining or labor management relations nor do the provisions of the Interstate Commerce Act require it. We should be careful so that we do not, because of lack of expert competence, contravene the national policy as to labor relations.

Id., 975. In a concurring opinion, Commissioner Gresham said that there is "no statutory basis for our intrusion in any way into the collective bargaining process." *Id.*, 983.

On the heels of this decision, the Commission declined to become involved in a crew assignment dispute, stating in terms apropos to this case:

That the crew assignment provision was not imposed by the Commission in the exercise of its jurisdiction under section 5(2)(f) of the Act but is a provision negotiated into the agreement by the ICG and the C&IM; that the Review Board expressly asserted the Commission's subject matter jurisdiction solely over matters affecting transportation services and determined only that this provision and other provisions in the agreement would have no adverse transportation effects; that as to all other subject matters including matters relating to labor relations as may fall within the purview of the Railway Labor Act the Board declined jurisdiction over such questions; and that, the Commission [has] no jurisdiction to either impose crew assignment provisions or to remove said provisions * * *.

Illinois Central Gulf R.R. - Trackage Rights - Chicago & Illinois Midland Ry. Co., Finance Docket No. 28046 (Feb. 15, 1977), J.A. 7-8.

The Commission also has held that it "has no authority to involve itself" in disputes arising out of employee protective conditions in which it has prescribed arbitration "in lieu of a Commission proceeding as the remedy for employee complaints." See *Brotherhood of Locomotive Engineers v. Louisville & N. R.R. and Missouri Pacific R.R.*, Finance Docket Nos. 29733 and 29786 (June 10, 1982) (Slip op. 5-6), on appeal to the U.S. Court of Appeals for the D.C. Circuit, Case No. 82-1944; and *Haskell Bell v. Western Maryland Ry.*, 366 I.C.C. 64, 67 (1982).

In *Brotherhood of Locomotive Engineers v. Chicago & N.W. Transportation Co.*, 366 I.C.C. 857 (1983), the ICC denied an appeal by the BLE from the dismissal of its

complaint alleging that the Chicago and North Western was operating over a line of the Indiana Harbor Belt in violation of 49 U.S.C. § 11343, thereby denying locomotive engineers on the latter railroad of employment and rights under 49 U.S.C. § 11347. Once again the Commission said that it would not become involved in labor management decisions and that it is not responsible for resolving labor controversies. The ICC said:

> BLE wants us, in effect, to arbitrate its dispute with IHB. This we will not do. As we pointed out in *Leavens, supra*, we lack the expertise to place ourselves into the fields of collective bargaining or labor management relations.

Id., 861.

Therefore, in the instant case, BLE reasonably anticipated that, in response to its petition for clarification, the Commission would advise that it had not imposed any crew assignment provisions because it had no jurisdiction to do so, and further would direct the parties to the procedures of the RLA or, at least, to the notice and other Article I, Section 4 procedures contained in the employee protective conditions imposed by it, which, of course, MP, MKT and DRGW have not followed. However, failing to treat these matters uniformly, the ICC then became directly involved in a labor relations matter—a dispute as to which employees shall operate trains.

Surprisingly, this switch in philosophy has not hindered the ICC in recent months from reverting to its original hands-off labor relations policy. In *Santa Fe Southern Pacific Corp. - Control - Southern Pacific Transportation Co.*, Finance Docket No. 30,400 (Dec. 9, 1985), the railroads involved in a consolidation under sections 11343

and 11344 sought an order to compel the rail labor unions to enter into negotiations, and ultimately binding arbitration, concerning implementation of rail employee protective conditions prior to Commission approval of the transaction. Specifically, the carriers asked the Commission to prescribe "procedures, under 49 U.S.C. § 11341, so as to displace the procedures established under any contrary provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* (RLA)." The Commission held:

> The petition presents two issues—whether we have the authority to grant the relief and, if so, whether we should do so. Applicants have not persuaded us on either basis that we could or should supercede (sic) RLA and alter existing labor agreements in advance of a decision on the merits of this case or a determination of the level of employee protection that may be imposed if the merger is approved. The decision in *Southern Ry. - Purchase - Kentucky & Indiana Terminal R.R.*, F.D. No. 29690, served March 3, 1982 (unpublished), (K&ITR), does not support applicants' request. There we declined to get involved in the collective bargaining process by enjoining, at the request of rail labor, negotiations that were proceeding under the *New York Dock* conditions. Here we are again being asked to affirmatively become involved in the collective bargaining process by mandating negotiations and, if necessary, binding arbitration and we similarly decline to do so. Therefore, we will deny the petition.

See App. A, *infra*, at A1.

Later, in *Lackawanna County Railroad Authority, Inc. - Exemption From Regulation*, Finance Docket No. 30628 (Jan. 24, 1986) (App. B, *infra* at A3), *appeal pending*, No. 86-3231 (3rd Cir.), in which the Commission exempted Lackawanna Valley Railroad from the requirements of 49 U.S.C. Subtitle IV, the Commission rejected BLE's contention that the Commission may not, through the exemption process in which no hearing is held, deny employee protection and at the same time relieve the owning carrier's work assignment commitment to its employees in consideration of a wage deferral agreement. The Commission said:

> Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.[14]

App. B at A9.

Thus, consistently over the years prior to this case, and even now, the Commission has taken the position that the issues of crew selection and seniority are to be handled under the collective bargaining prescribed by the RLA and that it lacks the expertise and authority to deal with labor management relations. Accordingly, it is beyond cavil that the Commission did not consider or even

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14. In *Penn Central Merger - Matter of Larry Zapp*, Finance Docket No. 21989 (I.C.C. May 13, 1986) resulting from the decision in *Zapp v. United Transportation Union*, 727 F.2d 617 (7th Cir. 1984), the Commission said with respect to its role in imposing employee protective conditions and any determination as to the propriety of Zapp's seniority standing resulting from the implementation of the Commission's order:

> This responsibility does not require nor has it been the intention of this Commission to displace collective bargaining as the appropriate vehicle for establishing seniority, or to displace arbitration as the proper means for determining whether an employee is affected by a transaction and the specific benefits occurring from that status.

think about the crewing issues in its October 20, 1982 decision.[15]

B. The Commission Failed To Provide Any Justification For Its View That The Carriers Are Automatically Immunized From The RLA And Their Contractual Obligations.

Although the ICC has broad discretionary power, that authority is not unlimited. Its decisions are subject to review on the basis of whether the law has been properly interpreted and applied and whether the decision question has been based on substantial evidence. *Northern Lines Merger Cases*, 396 U.S. 491, 503 (1970)

In the instant case, the ICC once again appears to have made a result-oriented decision which would impose its will over that of Congress. In vacating another result-oriented decision, the Court of Appeals for the District

15. Notwithstanding the most recent pronouncements of the ICC, on August 22, 1985, the Commission said that the provisions of both the WJPA and the RLA have been "reflected and subsumed in the conditions imposed by the Commission." *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific & Springfield Terminal Ry. - Exemption From 49 U.S.C. 11342 and 11343*, Finance Docket No. 30532 (Aug. 22, 1985), *appeal pending*, No. 85-1636 (D.C. Cir.). See Pet. Add. 40a, at 49a. If, as the Commission contends therein, the Commission's labor protective provisions provide for compulsory binding arbitration "to arrive at implementing agreements if the parties are unable to do so, so that approved transactions can ultimately be consummated," the ICC's application of section 11341 as a self-executing exemption in the instant case deprived the employees represented by BLE on MP of the use of those procedures. However, a full reading of that opinion establishes that the Commission, in response to the decision below, is now saying that the RLA, the WJPA, and even the ICC imposed protections of the collective bargaining rights of the affected employees are preempted and set aside by its order exempting a financial transaction from the requirements of the ICA. In short, the Commission appears to be coming up with arguments that were not even conceived at the time it entered its order on October 20, 1982.

of Columbia Circuit recently said that the ICC "cannot hide the standards under which it operates, for we are unable to evaluate whether its reasoning meets the reasoned decision making requirement unless we know against what standards its factual findings have been judged." *Coal Exporters Ass'n. v. United States*, 745 F.2d 76, 99 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 2151 (1985). *Also see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Until this case, the Commission has interpreted the ICA as not providing it with jurisdiction over labor relations and collective bargaining matters and has held that determinations of seniority and crew assignment matters are best left to the procedures of the RLA and the imposed employee protective conditions. The Court of Appeals below appropriately noted that the "ICC's analysis of the necessity for waiving the Railway Labor Act, however, is virtually nonexistent," and "the Commission did not give a shred of reasoning to support its view that completion of the transaction required shielding crew selection from the Railway Labor Act." Pet. App. 19a.[16] Thus, it follows that:

16. To support its interpretation and application of section 11341 as self-executing in this case, the ICC apparently relies on *Brotherhood of Locomotive Engineers v. Chicago & N.W. Ry.*, 314 F.2d 424 (8th Cir. 1963), *cert. denied*, 375 U.S. 819 (1963), although the Commission had never adopted that reasoning previously. Actually, that case, which arose from a declaratory action by a carrier, only stands for the proposition that to the extent the involved railroads and unions have entered into an agreement, which is approved by the Commission and made part of its conditions, the carrier is removed from obstacles posed by the RLA that would defeat the consolidation. *See also* opinion of court below, at Pet. App. 18a n.6, further distinguishing the Eighth Circuit's decision. Here there is no voluntary agreement setting the levels of employee protection. Nevertheless, at most, that decision holds that the compulsory arbitration provided by that agreement is the procedure to be followed in

(Continued on following page)

Whatever deference must be accorded "the interpretation of a statute by an agency charged with its enforcement", *Meade Township v. Andrus*, 695 F.2d 1006, 1009 (6th Cir. 1982), such an agency, at the very least, must be held to its own interpretation. While an agency may not be "disqualified from changing its mind", it must give sufficient reasons for its new interpretation. Otherwise, a reviewing court cannot "approach the statutory construction issue . . . with[] regard to the administrative understanding of the stataute[]." *NLRB v. Local Union No. 103*, 434 U.S. 335, 351 (1978); see majority op. at 1186. No reasons whatsoever were given by the ICC for the broad change in its interpretation of the Act in the instant case.

Crounse Corp. v. ICC, 781 F.2d 1176, 1198-1199 (6th Cir. 1986) (Timbers, J., dissenting), *petition for reh'g denied*, 787 F.2d 1031 (6th Cir. 1986).

On this basis alone, the Court of Appeals correctly held that the Commission could not automatically rely upon

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Footnote continued—

adjusting the seniority rights of the employees affected by the consolidation. Rather than detracting from the decision below, the Eighth Circuit's expressions further it by establishing that the merits of the subject were not touched by the Commission's order; section 11341 merely activated the ultimate decision-making procedure as to a direct aspect of the consolidation. The dichotomy in ICC's reasoning is typified by its decision of October 19, 1983 in which it denied reconsideration, when it attempted to distinguish its decisions in *Illinois C. G. R.R. - Trackage Rights - over Chicago & I. M. Ry.*, Finance Docket No. 28046 (Feb. 15, 1977), and *Cairo Terminal Railroad - Trackage Rights Exemption - Illinois C. G. R.R.*, Finance Docket No. 30138 (May 17, 1983), that the Commission would not inject itself in crew assignment and other labor disputes, on the basis that the former case involved a negotiated agreement and the latter arose in an exemption proceeding under 49 U.S.C. §10505. Obviously, the Commission is saying the exemption is not automatic in those instances.

section 11341, but, "must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction." Pet. App. 45a.

The Commission's decision on clarification that its approval automatically immunized the carriers from the procedures of the RLA, and even the Commission-imposed protective conditions, clearly overreaches its authority. And the purported basis for that decision, *i.e.*, the references in the applications to the use of the tenant railroad's employees and the approval of the trackage rights agreements in subsequent compensation hearings, no longer exists in the usual trackage rights case. *See Railroad Consolidation Procedures - Trackage Rights Exemption*, Ex Parte No. 282 (Sub-No. 9) (April 19, 1985); 49 C.F.R. §§ 1180.2, 1180.6. Since trackage rights agreements have been afforded a class exemption, except when sought as conditions to a rail consolidation, no application need be filed with the ICC and no forum is available to raise the issues the Commission contends should be raised in the public interest phase of its proceedings. Under such circumstances the exemption cannot be self-executing, because there is no basis for its invocation.

C. The Court of Appeals Correctly Held That The Commission Must Make A Finding Of Necessity To Exempt Crew Selection From The RLA And Collective Bargaining Procedures.

1. The exemption contained in section 11341 is not as broad as asserted by the ICC but only extends by its terms to those exclusions "necessary to let that person carry out the [approved or exempted] transaction." Thus,

the ICC's authority to approve trackage rights agreements, while it may be plenary, is not absolute or without meaningful limitations.

In *City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), the Fifth Circuit ruled that the ICC had exceeded its authority under section 11341 by abrogating certain agreements requiring one of the railroads involved in a consolidation to maintain an office and a certain percentage of its work force in Palestine. Although an agreement may be burdensome, that Court of Appeals said:

> In its grant of authority, Congress did not issue the ICC a hunting license for state laws and contracts that limit a railroad's efficiency unless those laws or contracts interfered with carrying out an approved merger.

Id., 414.

Congress, as this Court found in *Schwabacher v. United States,* 334 U.S. 182 (1948), has manifested an intention not to abrogate state law unless it interferes with carrying out an approved merger. That principle is much stronger here, for 49 U.S.C. § 11347 would be superfluous if the RLA and the contractual obligations of the railroads to their employees were automatically exempted. The employees would be deprived of their statutorily guaranteed continuation of collective bargaining rights, rates of pay, rules and working conditions embodied in agreements, and their rights under the RLA. In *Schwabacher v. United States, supra,* the ICC declined in a consolidation to consider claims of dissenting shareholders under state law, because it thought it lacked jurisdiction. *Id.*, 201-202. This Court later remanded to

the Commission to make specific findings whether the stock valuation was just and reasonable to these claimants with directions to consider state law to the extent it might affect the intrinsic value of their stock, even though the Commission had found the public interest in the plan as a whole was just and reasonable. In this case, to the extent that the Commission refused to specifically consider and find that the resolution of crew manning was necessary to the transaction and that the specific terms were just and reasonable, it erred.

Moreover, the Fifth Circuit has held that the term "transaction" used in 49 U.S.C. §§ 11341(a) and 11343 (a) is, for exemption purposes, limited to the transfer of the right to DRGW and MKT trains to use certain MP and UP lines and does not extend to the subject of the employees manning those trains. *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962). In sum, the section 11341 exemption is limited to those laws and statutory proscriptions which prevent the consummation of the transaction authorized by the ICC, and the scope of that exemption is limited to the powers "necessary to let the person carry out the transaction."

2. In light of the limitations upon the ICC's powers, there must be adequate and proper findings by it to support any decision that it, in fact, determines that termination of the employees' right to participate in crew selection is necessary. *SEC v. Chenery Corp.,* 332 U.S. 194 (1947). In short, the grounds for its decision must be clear and to the point, for the reviewing court "must know what a decision means before the duty becomes ours to say whether it is right or wrong." *Id.* at 197, citing *United States v. Chicago, M., St.P.&P. R.R.,* 294 U.S. 499, 511 (1935).

These principles were given further meaning in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962), which involved the relationship of the ICA to the federal labor relations laws. Unionized trunk line motor carriers refused to handle goods from nonunion short line truckers under the "hot cargo" clauses in their labor contracts. The short line carriers organized another company and applied to the ICC for authority to act as an interstate carrier, and the ICC granted the application. Shortly thereafter, the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, was amended, placing in issue the validity of the union induced boycott. A three-judge district court affirmed. In reversing, this Court found that the Commission had a choice of remedies, and held that the ICC had failed to properly justify its choice of remedy and disclose the grounds for its order. In discussing the relationship between the ICA and the labor laws, the Court said:

> . . . Commission should be particularly careful in its choice of remedy, and should have been particularly careful, because of the possible effects of its decision on the functioning of the national labor relations policy. The Commission acts in a most delicate area here, because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the unions and employees. The policies of the Interstate Commerce Act and the Labor Act necessarily must be accommodated, one to the other.
>
> * * *
>
> Implicit in this analysis is a recognition that if either agency is not careful it may trench upon the other's jurisdiction, and because of lack of expert competence, contravene the national policy as to transportation or labor relations.

Id., 172-173.

In the instant case, the ICC, in denying clarification of its order and application of the employee protective conditions imposed by it, states that its earlier orders "unambiguously specified that trackage rights tenants may perform operations using their own crews." J.A. 36. However, when those prior decisions are examined, it becomes apparent that the ICC merely indicated that the tenants proposed to use their own crews, not that this was a requirement. Clearly, the ICC did not examine the terms of the trackage rights agreements and made no findings that could be a basis for its order.

However, in its "clarification", the ICC did not even stop at this point. It claimed that it meant to grant the railroads immunity from the RLA and to give them the right to select the employees of MKT or DRGW to perform work belonging to MP employees, work which is protected by the Railway Labor Act and which cannot be taken away without an agreement reached pursuant to said Act.[17] If a result like this could be reached by the ICC, it could be accomplished only after the ICC attempted to accommodate the policies of the RLA with those of the ICA. As set forth above, the accommodation would have to be explained by specific findings and supported by substantial evidence which shows that the ex-

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17. *See, e.g., St. Louis Southwestern Ry. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1983), *cert. denied*, 456 U.S. 945 (1982), which held that a carrier, subject to an employee protective agreement imposed by the Commission in the purchase of certain lines of a bankrupt rail carrier, violated section 6 of the RLA, 45 U.S.C. § 156, by contracting out work on the purchased line.

emption under section 11341 is necessary to enable the trackage rights tenants to carry out the transaction approved by the ICC, *i.e.*, operation of MKT and DRGW trains over MP track, and that without such exemption, the trackage right operations could not be effectuated.

3. While the Government and MKT insist that crew mannings could be an obstacle to effectuating a transaction, there are no hard facts from which to draw that inference. Although railroad employment has declined from about 1,250,000 employees to approximately 300,000 over the years—a goodly portion of such decline resulting from consolidations, abandonments and other carrier financial transactions pursuant to the ICA—the lesson of the last four to five decades is that strikes or threats of major disruptions have not presented any obstacle to the completion of those transactions. And DRGW has conducted its trackage rights operations for three years with MP crews, which again proves that such operations are feasible and fiscally responsible.

Further, due to the procedures within the unions to handle such matters (see *supra*, 4), crew manning issues are unlikely to prevent trackage rights applications from being implemented. Although railroad employees do consider themselves as having a proprietary interest in the lines of rail over which they operate (*see, e.g., Primakow v. Railway Express Agency, Inc.*, 60 F. Supp. 691 (E.D. Wis. 1945)), as the dissenting opinion in the court below suggests, the use of the owning carrier's operating crews, in whole or part, should not constitute any financial hindrance to the tenant line due to the labor structure in the industry.

D. Application Of The RLA Procedures Would Not Impede The Implementation Of Commission-Approved Transactions.

The policy of encouraging collective bargaining, thereby granting railroad employees a voice in their employment life, pervades the federal railroad labor relations law. In fact, the dictation of crew assignments and other labor relations matters by railroads under the alleged imprimatur of Commission approval runs counter to the Congressional policy of encouraging collective bargaining "in order to prevent if possible, wasteful strikes and interruptions of interstate commerce." *Detroit & T. S. L. R.R. v. United Transportation Union*, 396 U.S. 142, 148 (1969). Thus, while the RLA procedures embodying that policy do not impede implementation of Commission approved transactions, even if they did, Congress, not the ICC, is the body empowered to modify those procedures.[18]

During 1923-24, the federal administration under Presidents Harding and Coolidge asked for modifications in the Transportation Act of 1920 to remedy weaknesses, particularly in the area of labor management relations. *The Railway Labor Act at Fifty*, National Mediation Board (G.P.O., Washington, D.C. 1976), at 7. In this context, the 1924 platform of the Republican Party proposed enactment of a Railway Labor Act, stating:

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18. Congress considers those procedures appropriate for even bankrupt railroads:

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

11 U.S.C. § 1167, Pub. L. No. 95-598, 92 Stat. 2642 (1978)

> Collective bargaining, mediation, and voluntary arbitration are the most important steps in the maintaining of peaceful labor relations and should be encouraged. We do not believe in compulsory action.

Id.

Under the urging of President Coolidge, a committee of railway executives and union representatives produced a draft of a bill in 1925 which ultimately became the RLA. *Id.* at 8. The RLA, which has been amended from time to time, has been the subject of decisions of this Court in a long line of cases over the past six decades. *Texas & N.O. R.R. v. Brotherhood of Railway and Steamship Clerks,* 281 U.S. 548 (1930), upheld the constitutionality of the Act, holding, among other things, that "the major purpose of Congress in passing the Railway Labor Act was to 'provide machinery to prevent strikes.'" *Id.*, at 565. In its numerous decisions on this subject, the Court has noted "the Act established rather elaborate machinery for negotiation, mediation and voluntary arbitration, and conciliation." *Detroit & T. S. L. R.R. v. United Transportation Union,* 396 U.S. 142, 148-149 (1969).

Although from time to time measures have been advanced to provide for compulsion and anti-strike laws, the RLA has served as the basis for labor management harmony and industrial peace in the railroad industry. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 379 (1969). The choice made by Congress consistently has been to favor collective bargaining, which is conceived necessary to the long-term maintenance of industrial peace in the railroad sector.

In *Order of Railroad Telegraphers v. Chicago & N.W. Ry.*, 362 U.S. 330 (1960), this Court was confronted with

a somewhat similar situation. That decision arose out of the filings by the carrier with state public utility commissions to eliminate various stations, which would have resulted in loss of jobs for some station agents and telegraphers. The carrier refused to negotiate with the union on the ground that the request did not raise a bargainable issue under the Railway Labor Act and that the state commissions had the power to determine whether station agencies could be discontinued, which power could not be evaded by entering into a bargaining agreement. This Court found the legislative history and language of the legislation revealed a non-interventionist policy in labor disputes in order to promote freedom of association, organization, representation and negotiation on the part of workers. *Id.*, 336. Rejecting the argument that employees have "no collective voice to influence railroads to act in a way that will preserve [their] interests" (*id.*, 338), the Court opined that both the "Railway Labor Act and the Interstate Commerce Act recognized that stable and fair terms and conditions of railroad employment are essential to a well-functioning national transportation system." *Id.*, 337.

With respect to the same issue now raised by the ICC's decision herein, the Court rejected the concept that the Interstate Commerce Act abrogates the right of the carrier's employees to negotiate on job security and stability:

> It would stretch credulity too far to say that the Railway Labor Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. There is no express provision of law, and

> certainly we can infer none from the Interstate Commerce Act, making it unlawful for unions to want to discuss with railroads actions that may vitally and adversely affect the security, seniority and stability of railroad jobs.

Id., 339-340.

In response to the carriers' argument that negotiations and possibly continued operation of service and lines would be wasteful and contrary to the policy expressed in the Interstate Commerce Act to foster an efficient national railroad system, the Court said that "Congress has acted on the assumption that collective bargaining by employees will also foster an efficient national railroad service." *Id.*, 342.

Moreover, the Fifth Circuit has clearly held that the term "transaction" used in 49 U.S.C. §§ 11341(a) and 11343(a) is for exemption purposes limited to the transfer of the right to DRGW and MKT trains to use certain MP and UP lines and does not extend to the subject of the employees manning those trains. In *Texas & N.O. R.R. v. Brotherhood of Railroad Trainmen,* 307 F.2d 151 (5th Cir. 1962), that Court of Appeals in examining this question concluded that the immunity granted by what is now section 11341(a) did not extend to those proposals before the ICC which dealt with the applicant carrier's intentions concerning rail labor. In so holding, the court relied upon the terms of the statute and upon prior Commission interpretations of its authority. *See also City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978), which held that the Commission may nullify state law only when its restraints absolutely prohibit a consolidation.

These cases establish that the Commission has not been given a license to eliminate contracts and to relieve rail carriers from their collective bargaining obligations. This callous and cavalier disregard of the employment and seniority rights of the employees of the owning railroad assuredly has generated labor unrest in the instant case and may very well threaten the success of trackage rights and other future transactions, if the Commission's view is sustained.

Should the Carriers not be relieved from the RLA, any controversy that may arise relative to labor relations matters can nevertheless be adequately handled under the RLA's procedures and, if necessary, as to "the selection of forces from all employees involved" and "any assignment of employees made necessary by the transaction" through the notice, negotiation and arbitration provisions set forth in Article I, Section 4 of the Commission imposed employee protective conditions.

However, as the Second Circuit concluded in *New York Dock Ry. v. United States,* 609 F.2d 83, 101 (2d Cir. 1979):

> . . . [T]he ICC's imposition of these labor protective conditions may place substantial hurdles in the path of rail carrier management seeking to consummate in a smooth and rapid manner transactions covered by 49 U.S.C. §11343-11346. If that proves to be the case, however, the solution would appear to be in an appeal to Congress, rather than to the courts.

Seemingly, the same observation would be applicable to any obstacles the RLA may impose in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.[19]

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
JOSEPH E. PREKOP
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313
Counsel for the Brotherhood of Locomotive Engineers

19. In light of the ICC's ruling in the *Southern - Central of Georgia* Case, *supra*, and its consistent disclaimer of jurisdiction in crew manning matters, as well as the fact that crew selection on its face is not a necessary facet of nor an impediment to a trackage rights transaction, remand to the ICC would not be appropriate. BLE, therefore, suggests that the parties be left to their remedies under the RLA, as the court below decided in its initial opinion, or, insofar as selection and assignment of work forces to the ICC imposed employee protective conditions.

APPENDIX A

Decision in Santa Fe Southern Pacific Corporation - Control - Southern Pacific Transportation Company

INTERSTATE COMMERCE COMMISSION
DECISION NO. 21

Finance Docket No. 30400[1]

SANTA FE SOUTHERN PACIFIC CORPORATION - CONTROL - SOUTHERN PACIFIC TRANSPORTATION COMPANY

Decided: December 9, 1985

By emergency petition for extraordinary relief filed October 31, 1985, the Atchison, Topeka and Santa Fe Railway Company (ATSF), Southern Pacific Transportation Company (SPT), and Santa Fe Southern Pacific Corporation (SFSP), (the railroads), seek an order authorizing ATSF and SPT to compel rail labor unions to enter into negotiations, and ultimately binding arbitration, concerning implementation of rail employee protective conditions. These negotiations would be conducted in anticipation of possible approval of the consolidations that are presently being considered by the Commission. While not asking the Commission to determine, at this time, whether to approve the merger, or what level of employee protection will be imposed if approved, applicants seek a determination concerning the appropriate procedures for resolving any disputes that may arise in connection with negotiating changes in labor agreements necessary to implement the transactions if approved. This would involve prescribing procedures, under 49 U.S.C. 11341, so as to displace the procedures established under any contrary provisions of

1. Embraces Finance Docket No. 30400 (Sub-Nos. 1-20 and MC-F-15628).

the Railway Labor Act, 45 U.S.C. 151 *et seq.* (RLA). The Railway Labor Executives' Association (RLEA) has replied. The railroads filed a petition for leave to file a reply to RLEA's reply. The railroads simultaneously filed a reply. The petition for leave to file a reply is granted and the reply is accepted into the record.

As pertinent here, RLEA argues that in order to make the findings necessary to remove the entire transaction from the RLA at this time, the Commission must prejudge the merits of the consolidation and alter prior labor agreements. It is suggested that seniority and other rights of rail employees will be ignored or subjected to unilateral changes as the result of imposing, at this time, the procedures set out in *New York Dock Ry - Control - Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979). The unions request oral argument.

The petition presents two issues—whether we have the authority to grant the relief and, if so, whether we should do so. Applicants have not persuaded us on either basis that we could or should supercede RLA and alter existing labor agreements in advance of a decision on the merits of this case or a determination of the level of employee protection that may be imposed if the merger is approved. The decision in *Southern Ry. — Purchase — Kentucky & Indiana Terminal R.R.*, F.D. No. 29690, served March 3, 1982 (unpublished), (K&ITR), does not support applicants' request. There we declined to get involved in the collective bargaining process by enjoining, at the request of rail labor, negotiations that were proceeding under the *New York Dock* conditions. Here we are again being asked to affirmatively become involved in the collective bargaining process by mandating negotiations and, if necessary, binding arbitration and we similarly decline to do so. Therefore, we will deny the petition.

APPENDIX B

Decision in Lackawanna County Railroad Authority, Inc. - Exemption From Regulation

INTERSTATE COMMERCE COMMISSION
DECISION

Finance Docket No. 30628

LACKAWANNA COUNTY RAILROAD AUTHORITY, INC. - EXEMPTION FROM REGULATION

Decided: January 24, 1986

We are denying the petitions to reopen filed by the Pennsylvania State Legislative Board-United Transportation Union (UTU), the Brotherhood of Locomotive Engineers (BLE), and the Brotherhood of Maintenance of Way Employees (BMWE).

In a decision served on March 22, 1985,[1] we exempted the Lackawanna County Railroad Authority, Inc. (LCRA) from 49 U.S.C. Subtitle IV. That exemption also covered LCRA's: (a) acquisition of the following lines from the Delaware and Hudson Railway Corporation (D&H) in Lackawanna County, PA: (1) a portion of the Carbondale Branch between MP 196.8 in the Borough of Moosic and MP 174.59 in the Township of Fell, a distance of 22.21 miles; and (2) the 1.2-mile Vine Street Branch; and (b) acquisition of incidental trackage rights over D&H between MP 130.4 at Minooka Junction and MP 133.8 at Bloom Junction. We also exempted Lackawanna Valley Railroad Corporation (LVRC) from the prior approval requirements of 49 U.S.C. 10901 to operate the above-described lines.

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1. 50 Fed. Reg. 11950 (March 26, 1985).

PRELIMINARY MATTERS

BLE moves for leave to late-file a petition to join in UTU's petition to reopen. LCRA, LVRC, and D&H jointly move to strike BLE's motion on the grounds that the decision served March 22, 1985 is administratively final as to BLE, and that BLE has not shown material error, new evidence, or substantially changed circumstances to justify reopening. However, our rules of practice are to be construed liberally (49 C.F.R. 1100.3), and we find that BLE's petition does not broaden the issues raised in UTU's petition. Accordingly, BLE's motion for leave to late-file is granted, and the motion to strike is denied.

BLE replied to the motion to strike, arguing that equitable considerations relating to a wage deferral agreement between labor and D&H preclude transfer of a D&H line without imposition of labor protective conditions. D&H, LCRA, and LVRC responded to BLE's arguments and move to strike them on the grounds that some are redundant and the above argument broadens the issues. Since those carriers have been able to respond and thus have not been prejudiced, we will deny their motion to strike.

On July 11, 1985, BMWE late-filed a letter-petition stating that it endorses UTU's and BLE's petitions to reopen. It also attached a brief verified statement, to which D&H, LCRA, and LVRC replied. Although BMWE's filing is late, and we admonish it to act promptly in the future or its pleadings will be rejected, we will accept its petition since it relies primarily on the record already made and D&H, LCRA, and LVRC have been able to respond to it.

BACKGROUND

LCRA, a noncarrier municipal corporation, entered an agreement with D&H to acquire the two line segments and trackage rights. It plans to rehabilitate the lines, but will not hold itself out as an operator. Instead, operations will be performed by LVRC.

UTU, BLE, and BMWE have petitioned to reopen because we did not impose employee protection conditions on D&H when we granted the exemptions. D&H embargoed the northern 16-mile segment in December 1983 because of poor track conditions. It operated over the southern 7-mile portion on an "as needed" basis, which was usually two or three times a week. D&H did not file an abandonment application.

DISCUSSION AND CONCLUSIONS

Petitioners first argue that we should dismiss the exemption petitions because the purchase and operating agreements are not in evidence. However, detailed proof for exemptions is neither required by 49 U.S.C. 10505 nor by our exemption procedures. Ex Parte No. 400, *Modification of Procedure For Handling Exemptions Filed Under 49 U.S.C. 10505*, (not printed), served December 29, 1980.

Petitioners next argue that LVRC's operation of LCRA's line is governed by 49 U.S.C. 11343, because exemption from that section was the relief they requested. We determine which statute governs our deliberations based on an analysis of the actual nature of the transaction. Neither LVRC nor LCRA were carriers when they filed the exemption. Section 11343 is applicable only to transactions where both the buyer and seller of rail property are carriers. *Application Proc. - Construct, Acq. or Oper. R. Lines*, 365 I.C.C. 516, 518 (1982). Section

10901, however, governs rail entry and the creation of new carriers. Since LVRC and LCRA are new carriers, section 10901 would govern this transaction, if it had not been exempted, not section 11343.

Petitioners also contend that we erred in finding that the proposed trackage rights are *de minimis* and purely incidental to the section 10901 acquisition. However, the proposed trackage rights are only 4 miles in length and in concert with the acquisitions constitute a single, new, integrated operating proposal. Since the trackage rights transaction is contemporaneous with and incidental to the section 10901 acquisition, it also falls within section 10901. *See* Finance Docket No. 30505, *Alabama So. R.R. Co. and the Alabama Great S. R.R. Co. - Acqs. Opers. and Trackage Rts. - Exemption,* ..... I.C.C. 2d. ..... (1984).

Petitioners further contend that D&H desires to abandon the involved lines and that it cannot escape liability for employee protection conditions by selling the lines. UTU cites some cases similar to this proceeding (although they did not involve exemptions) in which we imposed abandonment-type labor protection conditions on vendors of the involved lines. Contrary to its assertion, however, imposition of such conditions was discretionary, not mandatory. *See Knox & Kane R. Co. — Petition for Exemption,* 366 I.C.C. 439, 443 (1982) (*Knox*).

Petitioners' assertion that section 10903 governs D&H's discontinuance of its operations is incorrect. We have uniformly held that noncarrier acquisition of a rail line is governed by section 10901. *Application Proc. — Construc. Acq. or Oper. R. Lines,* 365 I.C.C. 516 (1982). This policy has been applied consistently in granting exemption from the requirements of 49 U.S.C. 10901 where the proposed transaction would result in the transfer of a rail line slated for abandonment by a carrier to a noncarrier proposing to continue rail operations. *See, e.g.,* Finance Docket No. 30462, *Burlington, C.R. & N. Ry. Co. — Exemption* (not printed), served May 21, 1984, and Finance Docket No. 30431, *Minnesota Valley Transportation Co., Inc. — Southwest — Temporary Exemption* (not printed), served March 16, 1984). The Commission's holding that a certificate of abandonment is not required when a railroad contemplating abandonment sells its line to a noncarrier has been sustained in *Illinois v. United States,* 604 F.2d 519 (7th Cir. 1979); *In re Chicago, Milwaukee, St. Paul & Pacific R.R. Co.,* 658 F. 2nd 1149, 1164, 1169 (7th Cir. 1981), *cert. denied,* 445 U.S. 1000 (1982); and *Railway Labor Executives' Assn. v. United States,* 697 F. 2nd 285 (10th Cir. 1983).

Petitioners also argue that *Smith v. Hoboken R. Co.,* 328 U.S. 123 (1946) (*Smith*) requires D&H to abandon its line before LCRA can acquire it. This is an improper reading of *Smith. Smith* was decided under section 77 of the Bankruptcy Act, not the Interstate Commerce Act. More importantly, *Smith* involved an involuntary lease forfeiture situation, not a voluntary sale.

UTU is also incorrect in claiming that the only instances where the Commission has permitted a carrier to transfer its line to another person without imposition of employee conditions involve "entire line" abandonments. *Knox, supra,* for example, which involved acquisition of track from the Baltimore and Ohio Railroad Company, did not involve an entire line abandonment. Furthermore, in that decision, at 443-444, we stated several reasons why imposition of protective conditions on vendors may have effects contrary to objectives of the rail trans-

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portation policy. We concluded that "although the imposition of the *Oregon III* conditions on a vendor may at times be justified, there are countervailing considerations which dictate that this policy not be reflexively applied." No showing justifying the imposition of labor protective conditions has been made.

BMWE alleges that five D&H employees have already been adversely affected by a change in the location of the headquarters to which they report. It notes that, prior to the sale of the Carbondale Branch, D&H closed its facilities at Carbondale, Green Ridge, and Wyoming Avenue in anticipation of the sale. It predicts that additional employees will be displaced or furloughed due to the sale unless labor protective conditions are imposed on D&H. The carriers reply that BMWE's allegations are unsubstantiated and that it waited so long to submit its views that it requests retroactive application of labor protection on a consummated transaction.

The facts BMWE has outlined are similar to those in *Knox, supra*. In *Knox* a number of employees were adversely affected by the transaction. However, the Commission found that the rail transportation policy considerations concerning fair wages and safe and suitable working conditions in the industry were outweighed by policy objectives to foster sound economic conditions in transportation and to ensure the development and continuation of a sound rail transportation system. We reach the same conclusion here and will not impose protective conditions on D&H based on BMWE's arguments.

BLE argues that equity demands the imposition of protective conditions because D&H and 21 labor organizations, including BLE, signed a still-effective 12 percent wage deferral agreement as a means of D&H reaching self

sufficiency. One of the considerations in this agreement was the creation of job stability for the D&H employees who gave up 12 percent of their wages. BLE quotes Item 11 of its agreement in which D&H:

> [A]grees to maintain a rigid observance of all existing contract provisions relating to the transfer of work to other D&H work sites *or to other rail companies,* particularly those owned or sought to be owned by GTI. (Emphasis added).

BLE contends that the agreement commits D&H to using its employees to serve those lines transferred to another, and that D&H can change its commitment only by serving notice under section 6 of the Railway Labor Act and negotiating a change. BLE further argues that the Commission may not, through the exemption process, relieve D&H of its commitment, and that failure to grant D&H's employees protection based on D&H's contractual representation to them would constitute an abuse of discretion.

D&H, LCRA, and LVRC reply that this is an issue beyond the Commission's jurisdiction because it involves disputes as to the interpretation of labor agreements that should be resolved pursuant to their provisions and the Railway Labor Act. They also contend that sale of a rail line does not constitute farming out or transfer of work.

Whether or not the agreement between D&H and its employees is a matter that applies to these transactions is outside of our jurisdiction. Therefore, our refusal to impose labor protection, in the face of this agreement is not an abuse of discretion, and would not resolve any conflict [sic] it.

The prior decision inadvertently failed to exempt LVRC from the prior approval requirements of 49 U.S.C. 11301 to permit it to issue $50,000 in common stock to provide initial working capital, although such an exemption was clearly intended by the discussion in the decision. Accordingly, we will revise the second ordering paragraph in our prior decision to exempt the stock issuance.

We conclude that the petitions for reopening should be denied, and that employee protective conditions are not required.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. BLE's and BMWE's motions for leave to join in UTU's petition are granted.

2. The motions of LCRA, LVRC and D&H to strike are denied.

3. Ordering paragraph number 2 in the prior decision is revised to read:

> 2. Lackawanna Valley Railroad Corporation is exempted from the prior approval requirements of (a) 49 U.S.C. 10901 to operate the line, and (b) 49 U.S.C. 11301 to issue $50,000 in common stock.

4. The petitions to reopen are denied.

5. This decision is effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre and Lamboley. Commissioner Lamboley concurred with a separate expression.

JAMES H. BAYNE
(SEAL) Secretary

COMMISSIONER LAMBOLEY, concurring:

Although I concur in the result, I do not share the majority's discussion and conclusion on certain issues.

First, I continue to believe that as structured, the trackage rights, while an integral part of the transaction, are more properly encompassed by § 11343. § 11343 and § 10901 are compatible and not to be construed as mutually exclusive. See *People of Ill. v. I.C.C.*, 604 F.2d 519 (7th Cir. 1979).

Second, the decision fails to adequately discuss the common carrier obligations in relation to the purchase of the *active*, rail line. The majority terms both LVRC and LCRA as new carriers, yet the original decision notes only that LVRC assumes the common carrier obligation.

The decisions are silent and potentially confusing as to whether LCRA may have any common carrier obligation, notwithstanding LVRC's current assumption of obligation.[1]

Third, the decision fails to review the issue whether, for purposes of considering labor protection criteria and

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1. This issue seems squarely raised by (1) the fact LCVA requested exemption from such obligation, and (2) the protestants' arguments on reopening assume that LCRA was not so exempted, and does in fact have a common carrier obligation. Certainly those who are economically interested in and support continued rail service should not be left without Commission clarification of this issue.

the seller's status, there is a conceptual distinction between transactions involving sale of an active rail line and abandonment.[2]

Finally, it is appropriate to point out that meaningful review of labor protection issues are frequently hindered, as here, by the lack of an adequate presentation of specific factual evidence concerning dislocation and economic impact. General conclusionary allegations are simply not sufficient.

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2. This issue, although suggested by the cited Commission's discussion in *Knox & Kane Railroad Co. - Gettysburg Railroad Co. - Petition for Exemption*, 366 I.C.C. 439 (1982) is not reviewed in that case nor in our recent decision in Ex Parte No. 392 (Sub-No. 1), *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. § 10901*, I.C.C. 2d (served January 15, 1986).

QUESTIONS PRESENTED

1. Does the Interstate Commerce Commission have the power under 49 U.S.C. § 11341(a) to relieve a railroad of its obligations to employees under 49 U.S.C. § 11347, including a railroad's obligations to continue collective bargaining rights?

2. If the answer to the first question is in the affirmative, may the ICC relieve a carrier participating in an approved consolidation transaction of its obligations to its employees under the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, without first supplying specific findings to support its decision that such an exemption is necessary?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-792

INTERSTATE COMMERCE COMMISSION,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

No. 85-793

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT UNITED TRANSPORTATION UNION

On November 7, 1985, petitioners Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] and Missouri-Kansas-Texas Railroad Company [hereinafter, "MKT"] filed separate timely petitions with this Court for the issuance of writs of certiorari to the United States Court of

Appeals for the District of Columbia Circuit to review a decision by a divided panel of that court in *Brotherhood of Locomotive Engineers v. ICC*, 761 F.2d 714 (D.C. Cir. 1985), which vacated and remanded orders of the ICC in which the Commission concluded that an earlier ICC order had relieved several railroads of whatever statutory or contractual obligations they may have had to allow employees to participate in the selection of forces to perform certain trackage rights operations. On March 24, 1986, this Court granted the ICC's and MKT's petitions, and this review proceeding has followed.[1]

COUNTERSTATEMENT OF THE CASE

In October 1982, petitioner ICC issued a decision of almost two hundred pages with an additional one hundred and sixty-three pages of appendices approving the Union Pacific Corporation's request to create the Pacific Rail System, a holding company which would control the Missouri Pacific, Union Pacific and Western Pacific railroads. *Union Pacific Corp.—Control*, 366 I.C.C. 459 (1982), *aff'd in part, remanded in part sub nom. Southern Pacific Transportation Co. v. ICC*, 736 F.2d 708 (D.C. Cir. 1978), *cert. denied*, 105 S.Ct. 1171 (1985). Two months later, the applicants exercised that authority and formed a single rail system which operates over 22,000 miles of rail "connecting the Pacific Northwest, northern and southern California through the central corridor with the Midwest (including all major mid-continent east-west gateways), Mississippi River ports, Gulf Coast ports, and Texas-Mexico border crossing points." *Id.* at 474. That ICC approval, however, was not unlimited, for the Commission imposed two forms of conditions on its approval—*i.e.*, grant of trackage rights to competitors, and the imposition of employee protective provisions. It is the interaction of those conditions which has led to this proceeding.

[1] Respondents Brotherhood of Locomotive Engineers and United Transportation Union [hereinafter, "BLE" and "UTU," respectively] filed cross-petitions for writs of certiorari to review the underlying issue of whether an ICC order can ever be viewed as superseding Railway Labor Act or employee contractual obligations. Sup. Ct. Nos. 85-983 and 85-997. Those petitions are still pending.

After concluding that the proposed Pacific Rail System would pose anti-competitive problems in at least three geographical areas, the ICC believed that it could redress those anti-competitive concerns by granting a competitor in each geographical area access to the market in which adequate competition was threatened. 366 I.C.C. at 589. To accomplish this, the Commission imposed as a condition of its approval of the main control application the requirement that the primary applicants (*i.e.*, the Missouri Pacific and Union Pacific railroads) give several railroads trackage rights[2] over their lines to enable those competing railroads to serve the threatened markets. As relevant to this case, the Commission required the Missouri Pacific and Union Pacific to give the MKT trackage rights over approximately 200 miles of track from Kansas City, Missouri to Council Bluffs, Iowa.[3] 366 I.C.C. at 570. Another railroad, the Denver & Rio Grande Western Railroad [hereinafter, "D&RGW"] was to be given trackage rights over 619 miles of Missouri Pacific track from Pueblo, Colorado to Kansas City, Missouri. 366 I.C.C. at 572.[4] In both cases, neither the MKT nor the D&RGW had operated directly into

[2] Trackage rights, as the D.C. Circuit explained, "give one railroad the right to run its trains over another railroad's tracks." Appendix to ICC Petition [hereinafter, "ICC App."] at 7a n.2. Petitioner MKT (MKT Br. at 12 n.7) and the railroads participating as *amici* (*Amici* Br. 3 n.3) assert that it is standard industry practice for a trackage rights tenant to use its own power and crews. While respondent UTU agrees that this is true for "bridge" trackage rights—*i.e.*, trackage rights giving the tenant carrier the ability to bypass its own line to move the same traffic which it had previously moved—respondent has challenged this statement of industry practice for trackage rights which, as here, entail an extension of the tenant's operations into the landlord's markets to haul traffic previously moved by the landlord. This factual dispute was raised in *Missouri Pacific R.R. v. UTU*, E.D. Mo. Civil Action No. 83-771-C(1) (*see*, Sup. Ct. No. 85-1054), but was not resolved by the district court.

[3] Those trackage rights extended from Kansas City, Missouri to Omaha, Nebraska and from Union to Lincoln, Nebraska on the Missouri Pacific; Union Pacific tracks were involved from Omaha to Council Bluffs.

[4] A third carrier, the St. Louis Southwestern Railway, was granted trackage rights over the Missouri Pacific between Kansas City and St. Louis. Those rights duplicated the tenant's existing right to operate between those two points, albeit on a line which it acquired from another carrier in 1980. *See*, 366 I.C.C. at 585. The St. Louis Southwestern's implementation of those trackage rights is not at issue in this case.

those markets prior to the ICC's order, but, rather, had participated in the movement of the traffic generated from those markets by interchanging with the Missouri Pacific at Kansas City for the MKT and at Pueblo for the D&RGW. Consequently, as a result of the trackage rights conditions, MKT and D&RGW were to be given the right to haul traffic over Missouri Pacific tracks which, prior to this authorization, was transported by Missouri Pacific train crews over those same rail lines. Those grants of trackage rights authority, according to the Commission, were necessary "in order to preserve the competitive balance in transportation markets where competition might otherwise be significantly lessened as a result of the consolidations." 366 I.C.C. at 589.

Since the Missouri Pacific and Union Pacific had opposed the MKT's and D&RGW's trackage rights requests, the parties had not reached an agreement on the terms upon which the trackage rights would be granted, if required by the Commission, and, thus, the Commission did not have written agreements before it when it issued its 1982 Decision. That fact, however, did not preclude the ICC from granting the MKT's and D&RGW's requests, for as the Commission explained (366 I.C.C at 589):

> No agreements have been reached between the parties regarding the trackage rights for which we have found a need. We prefer that the parties set the terms of their trackage rights agreements wherever possible, and then seek our approval as required, 49 U.S.C. 11343. In the event the parties should be unable to reach agreement, we will set the terms for the trackage rights.

In order to give the railroads time for meaningful negotiations, the ICC stated that it would not entertain petitions requesting the Commission to set the trackage rights terms until at least 60 days after the effective date of the decision—*i.e.*, 60 days after November 19, 1982. 366 I.C.C. at 590. Nevertheless, the lack of specific terms was not to delay the implementation of trackage rights, for the Commission noted that: "[I]mmediately upon consummation of the consolidations, the imposed trackage rights will become effective and trackage

rights tenants will have authority to commence operations." *Id.* This was so even though one of the most "material" terms of a trackage rights arrangement—compensation—had not been set. This fact, however, did not preclude implementation, for the ICC added that: "Compensation, which will accrue from the actual date of the start of trackage rights operations, will be payable after terms have been determined." *Id.*

Compensation was not the only term left unresolved, for the Commission recognized in its decision that petitioner MKT's proposed operations "may require some revision." 366 I.C.C. at 569. For example, the ICC noted that the MKT's plan to use one crew to operate the 200 route miles "appears unrealistic." *Id.* But that was immaterial, for as the ICC explained (*id.*):

> If MKT cannot perform the proposed operations using only one crew, then it should be able to revise its plan to provide for service using two crews, with the crew change occurring at an appropriate point between Kansas City and Omaha. Although operations using two crews would be more costly than using one crew, such operations appear feasible and would prevent operating problems relating to hours of service laws [*i.e.*, federal law which limits train crews to twelve hours of continuous service with prescribed rest periods thereafter, 45 U.S.C. § 62].

Trackage rights were not the only form of conditions imposed by the ICC on its approval of the control application, for the Commission, in compliance with 49 U.S.C. § 11347, required the primary applicants and the trackage rights tenants to provide fair arrangements to protect the interests of employees who may be affected by the various transactions approved by the ICC.[5] First, the Commission provided that its control and coordination authority granted to Missouri Pacific, Union

[5] Certain rail labor organizations, including petitioner UTU, challenged whether the ICC had complied with 49 U.S.C. § 11347 in issuing its 1982 Decision because the ICC refused in that order to protect employees of nonapplicant carriers who might be affected by the control approval. 366 I.C.C. at 621. That challenge was rejected by the Court of Appeals for the

(footnote continues)

Pacific and Western Pacific was "subject to the conditions for the protection of employees enunciated in *New York Dock Ry.—Control—Brooklyn Eastern Dist.*, 360 I.C.C. 60 (1979)," *aff'd, New York Dock Ry. v. United States*, 609 F.2d 83 (2d Cir. 1979). 366 I.C.C. at 654, ¶ 17. And second, the ICC stated in its order that: "The trackage rights authority granted [to MKT and D&RGW, among others] . . . are subject to the imposition of the employee protective conditions to the extent specified in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653, 654 (1980) [*aff'd, Railway Labor Executives' Assoc. v. United States*, 675 F.2d 1248 (D.C. Cir. 1982)]." 366 I.C.C. at 654, ¶ 19.

Both sets of employee protective conditions (*i.e.*, the *New York Dock* and *Norfolk and Western* conditions) [6] require that the rail carriers upon whom those obligations were imposed preserve all "rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise . . . ." *E.g., Norfolk & Western* conditions, Art. 1, § 2, 354 I.C.C. at 610; [7] *see also,*

(footnote continued)

District of Columbia Circuit in *Southern Pac. Transp. Co. v. ICC, supra*, 736 F.2d at 725. This Court denied the petition by those labor organizations, including the UTU, for a writ of certiorari to review the court of appeals' decision. *BMWE v. United States*, Sup. Ct. No. 84-641.

[6] According to the Commission, the *New York Dock* conditions are the minimum levels of employee protection required by 49 U.S.C. § 11347 to be imposed in control, merger or purchase cases, whereas the *Norfolk & Western* conditions are the minimum levels to be imposed in trackage rights cases. *See*, 366 I.C.C. at 620, 622. While the monetary benefits provided by both sets of conditions are identical, their principal difference lies in their provisions requiring advance notice and negotiation before the carriers may implement a "transaction" which may adversely affect employees. *See*, note 8, *infra* at p. 7.

[7] Art. 1, § 2, of the *Norfolk & Western* conditions provides (354 I.C.C. at 610):

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including

(footnote continues)

New York Dock conditions, Art. 1, § 2, 360 I.C.C. at 84. Moreover, both sets of conditions provide that any carrier upon whom the conditions are imposed which contemplates consummating a "transaction" (*e.g.*, trackage rights under the *Norfolk & Western* conditions), must give advance notice of such a transaction to all "interested employees" and to their employee representatives, and must, if required, negotiate an implementing agreement to provide for, among other matters, "the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." *Norfolk & Western* conditions, Art. 1, § 4, 354 I.C.C. at 610; *New York Dock* conditions, Art. 1, § 4, 360 I.C.C. at 85. Both sets of conditions are virtually identical on this point and provide as follows:

> Each transaction which will result in a dismissal or displacement of employees or or rearrangement of forces, shall provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4.

Norfolk & Western conditions, Art. 1, § 4, 354 I.C.C. at 610-11; *New York Dock* conditions, Art. 1, § 4, 360 I.C.C. at 85.[8]

(footnote continued)

> continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

[8] A difference between the two sets of conditions is that the *Norfolk & Western* conditions uses the word "will" in the first line quoted above, whereas the *New York Dock* conditions uses the term "may." The main substantive differences between the notice and negotiation provisions in the two sets of conditions, however, concerns the length of the advance notice (*i.e.*, 90 versus 20 days) and the fact that the *New York Dock* conditions prohibits the consummation of a transaction until an implementing agreement is reached whereas the *Norfolk & Western* conditions does not prohibit the consummation of the transaction at the end of the 20 days notice period even though the parties are still negotiating an implementing agremeent. *See, Railway Labor Executives' Assoc. v. United States, supra*, 675 F.2d at 1253.

The dispute which has finally reached this Court has resulted from rail labor's attempts to enforce the requirements in both sets of conditions that the railroads preserve collective bargaining rights (*i.e.*, Art. 1, § 2) and that they give rail labor a voice in the crew selection process (*i.e.*, Art. 1, § 4). Petitioner MKT and the other involved railroads, along with the ICC, on the other hand, assert that those protective provisions must be viewed in light of the specific "transaction" approved by the Commission and, to the extent "that existing working conditions and collective bargaining agreements conflict with a transaction which [the ICC has] . . . approved, those conditions and agreements must give way to the implementation of the transaction." ICC Decision of October 25, 1983 at 6; ICC App. at 60a. This conflict arises in this case because both the MKT and the D&RGW submitted proposed operating plans in support of their trackage rights requests and included in those plans assumptions as to the manner in which they would staff the trackage rights operations; petitioners assert that those assumptions now control over conflicting provisions in either the employee protective conditions or the Railway Labor Act, 45 U.S.C. § 151, *et seq.*

In its application for trackage rights, petitioner MKT proposed using its own employees to perform its trackage rights operations over the Missouri Pacific and Union Pacific tracks and submitted a proposed agreement which provided that MKT "with its own employees, and its sole cost and expense, shall operate its engines, cars and trains on and along Joint Track." ICC Decision of October 25, 1983 at 8; ICC App. at 62a. D&RGW, however, was not so emphatic and stated in its application that it "'may, at its option, elect to employ its own crews for the movement of its trains, locomotives and cars'" over Missouri Pacific tracks. *Id.* at 9 quoting D&RGW application; ICC App. at 62a. During the hearings on their proposed trackage rights, counsel for the Union Pacific and Missouri Pacific questioned a D&RGW witness on that carrier's crew proposal; that witness explained that "'as these trackage rights are granted to us we are willing to sit down and work out any kind of arrangement you [UP-MP] want . . . .'" ICC Decision of October 25, 1983, at 10, quoting Transcript of June 23, 1981 hearing; ICC App. at 63a.

Contrary to petitioners' allegations (ICC Br. at 7-9; MKT Br. at 4) rail labor, including respondent UTU, did not sit idly by while the ICC was considering the contingent trackage rights applications. Respondent UTU was one of five (5) unions which participated as a protestant to the MKT and D & RGW trackage rights requests. *See,* 366 I.C.C. at 482; Joint Appendix to Court of Appeals [hereinafter, "J.A."] at ii (No. 15) and ix (No. 10). In their comments in opposition to the trackage rights applications of MKT and D&RGW, respondent UTU and the four (4) other labor organizations stated that the proposed trackage rights would "clearly have an effect upon employees." *E.g.*, Comments of Brotherhood of Maintenance of Way Employes, *et al.*, Finance Docket No. 30,000 (Sub-Nos. 20-33) at 2 (Certified Index No. 10 at J.A. ix). Respondent UTU and the other labor organizations stated further that:

> Consequently, the above labor organizations submit, this Commission must consider the interests of employees in passing upon the merits of this transaction, and must, if it approves this application, condition that approval by imposing a fair and equitable arrangement to protect the interests of employees who may be affected thereby.

Id. at 2-3. An identical position was taken by the UTU concerning the D&RGW's application (Comments of Brotherhood of Maintenance of Way Employes, *et al.*, Finance Docket No. 30,000 (Sub-No. 18) at 2-3 (Certified Index No. 15 at J.A. ii)), and in both cases respondent UTU requested the imposition of employee protective conditions which required, among other things, the preservation of collective bargaining rights, advance notice of the transaction, and the negotiation of an implementing agreement to provide for "the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case . . . ." *Id.* at Exhibit A, page 4. The substance of those requests were granted. 366 I.C.C at 654, ¶ 19.

When it approved the control application and imposed the MKT and D&RGW trackage rights as a condition of that

approval, the ICC did not expressly address, or suggest by implication, that the trackage rights applicants' crewing proposals were "material" terms of the trackage rights authority. On the other hand, the ICC's order provided that the grant of trackage rights authority to MKT and D&RGW was approved, but only "to the extent and under terms and conditions discussed in the decision" (366 I.C.C. at 654, ¶ 14), one such condition being that the trackage rights tenants' must agree to abide by the *Norfolk & Western* conditions. As the court of appeals remarked, therein "lies the nub of this case," for from all appearances, the ICC's imposition of employee protection qualified its approval of the crew selection proposals, rather than the reverse. ICC App. at 13a n.3.

A. MKT's and D&RGW's Trackage Rights Operations

Shortly after the control authority was consummated on December 22, 1982, the Missouri Pacific sent a letter on December 31, 1982, to various representatives of its employees, including respondent UTU, informing rail labor that the MKT and D&RGW would commence trackage rights operations over the Missouri Pacific in the near future; according to that letter, the MKT would commence its operations on or about January 3, 1983. *Missouri Pacific R.R. v. UTU*, E.D. Mo. Civil Action No. 83 771(c)(1), Memorandum Decision, reproduced as Addendum A to ICC Petition [hereinafter, "ICC Pet."] at 6a. Respondent UTU asked the Missouri Pacific to negotiate with it over the impact of those trackage rights operations on Missouri Pacific employees and over the transfer to MKT of the right to operate on Missouri Pacific tracks. ICC Pet. at 9a. Missouri Pacific refused to negotiate on either subject because, in its opinion, the ICC's October 1982 decision required it to grant trackage rights to MKT and it, therefore, had no right to negotiate about either the selection of forces to staff MKT's operations over its tracks, or other aspects of the impact of that transfer of operating rights on Missouri Pacific employees represented by the UTU. J.A. at 125-26. As the Missouri Pacific subsequently explained, "it would be inappropriate and unproductive" for it to bargain with the UTU because it had no

ability "to bind" MKT or D&RGW "to an agreement regarding selection of forces." *Id.*[9]

Petitioner MKT commenced operations over the Missouri Pacific's and Union Pacific's lines on January 6, 1983, using its own employees. Respondent D&RGW also commenced operations over the Missouri Pacific lines but, unlike MKT, used and is still using Missouri Pacific employees to perform those operations. J.A. at 74-75.

After unsuccessfully requesting the Missouri Pacific to bargain with it over the trackage rights operations by MKT, respondent UTU informed the Missouri Pacific that the employees which it represented on that carrier would withdraw their service at 12:01 a.m. on April 4, 1983. J.A. at 74. Respondent Missouri Pacific sought and obtained on March 30, 1983, a Temporary Restraining Order enjoining any strike by petitioner over this dispute. J.A. at 75. That interlocutory injunction was made permanent in 1984, and was subsequently affirmed by the United States Court of Appeals for the Eighth Circuit. *Missouri Pacific R.R. v. UTU*, 782 F.2d 107 (8th Cir. 1986), *pet. for cert. pending*, Sup. Ct. No. 85-1054.

B. Proceedings Before The ICC

Respondent BLE reacted differently to the carriers' refusal to negotiate over the crew selection issue and on April 4, 1983, it asked the ICC to clarify the prior order approving the control application. Respondent BLE asserted in its petition for clarification that the October 1982 decision did not mandate the use of MKT or D&RGW crews, but, rather, left the crew selection issue to be resolved under the procedures of the

[9] On June 16, 1983, respondent UTU asked all carriers involved in this case to negotiate implementing agreements under Article 1, Section 4 of the employee protective provisions to provide for a mutually agreeable basis upon which all affected employees, including Missouri Pacific employees, would be allowed to participate in the work opportunities presented by the trackage rights operations. J.A. at 122. The Missouri Pacific responded as quoted above, while petitioner MKT responded by asserting that it had negotiated agreements with its own employees, including an agreement with the UTU for MKT employees represented by the UTU, and, thus, it had no obligation under the ICC conditions to negotiate with the UTU over affected Missouri Pacific employees. J.A. at 129-31. D&RGW never responded to the UTU's request. J.A. at 117.

Railway Labor Act, 45 U.S.C. § 151, *et seq.* J.A. at 4. On May 18, 1983, the ICC issued a decision denying the BLE's petition. ICC App. at 51a. According to the Commission, there was no need to clarify its prior order because: "We have broad authority to impose conditions on consolidations and our jurisdiction is plenary." *Id.* at 54a. As the ICC explained: "Inasmuch as DRGW and MKT proposed in their applications that the operations would be performed with their own crews, our approval of the applications authorizes such operations." *Id.*

Respondent BLE, joined by the UTU which filed a separate petition, asked the ICC to reconsider its denial of the petition to clarify, asserting that the ICC did not have the authority to abrogate Railway Labor Act rights and that, even if it did, it had not done so in this case. *E.g.*, J.A. at 71. Those separate requests for reconsideration generated a fifteen (15) page decision by the ICC, served on October 25, 1983, in which the Commission asserted that 49 U.S.C. § 11347 did not limit its powers to abrogate Railway Labor Act obligations (ICC App. at 59a-60a) and that, since its immunity powers under 49 U.S.C. § 11341(a) were "self-executing," its decision automatically operated to relieve the carriers of "any requirements of law that could frustrate implementation of the trackage rights agreement as approved, including the crew assignment provision." *Id.* at 67a-68a.

Respondent UTU had asserted in its petition for reconsideration that Section 11341(a) could not be read as relieving a carrier of its obligations to employees under the Railway Labor Act or collective bargaining agreements because 49 U.S.C. § 11347 required the Commission to impose employee protective conditions which provided that the railroads must preserve those statutory and contractual rights. J.A. at 78-80. That argument was rejected by the Commission because, in the ICC's opinion, the UTU had misjudged the interrelationship between Sections 11341(a) and 11347; according to the Commission (ICC Decision of October 25, 1983, at 6; ICC App. at 59a-60a, emphasis added):

> . . . [S]tandard labor protection conditions generally preserve working conditions and collective bargaining agreements. The terms of those conditions, however, must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. *To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.* The labor conditions imposed under section 11347 preserve conditions and agreements in the context of the authorized transaction.

Respondents BLE and UTU filed separate petitions with the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, to review the ICC's decision of October 25, 1983; respondent BLE also asked the court of appeals to review the May 18, 1983 denial of the petition for clarification.

C. Court of Appeals' Decision

On May 3, 1985, a panel of the court of appeals, with one judge dissenting, issued a decision vacating the ICC's decisions. After rejecting an assertion that the unions' petitions to review were untimely because they had not been filed within 60 days of the October 1982 order, the divided panel addressed the unions' challenges to the merits of the ICC's denial of the petition for clarification and concluded that the ICC's 1983 orders should be set aside because the ICC "made no semblance of a showing that the exemption [concerning the crew selection issues] was necessary, as required by the exemption authority section [*i.e.*, 49 U.S.C. § 11341(a)] . . . ." ICC App. at 3a. As the majority stated:

> Congress has given ICC broad powers to immunize transactions from later legal obstacles, but this delegation by Congress is explicitly qualified by a necessity component. The statute thus requires that the exemption authority operate according to necessity, not according to whim or caprice.
>
> This statutory limit on the Commission's authority creates certain responsibilities for ICC. In ex-

> ercising its waiver authority ICC must do more than shake a wand to make a law go away. It must supply a reasoned basis for that exercise of its statutory authority.

Id. at 16a (footnote omitted).

Applying that principle to the case before it, the court observed that "the Commission did not give a shred of reasoning to support its view that completion of the [trackage rights] transactions required shielding crew selection from the Railway Labor Act." ICC App. at 19a (footnote omitted). Consequently, the majority concluded, the ICC "exceeded its authority when it claimed to have waived the Railway Labor Act regarding crew selection." *Id.* at 20a. The court then vacated in their entirety the ICC's decisions on the petition for clarification and the petitions for reconsideration. *Id.* at 21a.

On July 12, 1985, after the ICC had asked the court to reconsider its decision (including that portion of the decision vacating but not remanding), the court *sua sponte* amended its decision to provide that the case was to be remanded to the Commission for proceedings consistent with its opinion. Appendix to ICC Petition at 45a. The court also added in its *sua sponte* order that *(Id.)*:

> The Commission is not empowered [on remand] to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

Respondent UTU's assertion that the ICC's immunity provisions could not be read as relieving a carrier of its Railway Labor Act or contractual obligations to its employees because of 49 U.S.C. 11347, was not ruled upon. In the court of

appeals' view, its disposition of the case made a ruling on this issue unnecessary.[10] As the court stated (ICC App. at 20a-21a; footnote omitted):

> In view of this disposition, it is unnecessary to reach the second statutory issue whether ICC may ever waive the labor protection condition section (§ 11347) through the exercise of the exemption authority (§ 11341(a)). That issue turns on whether Section 11347 is viewed as a "law" that may be appropriately waived, or as a specific qualification on the exemption authority itself. We note only that the Commission has completely failed to show any conflict between these two sections of the Interstate Commerce Act, which we assume were meant to be read in concert rather than in conflict, and we need not comment on the unlikely event that the two sections may pose a genuine conflict in some later case.

This review proceeding on writs of certiorari has followed.

SUMMARY OF ARGUMENTS

I. Section 11341(a) of the Interstate Commerce Act provides that a carrier participating in a consolidation transaction approved by the ICC is relieved of restraints imposed by all laws, including federal law, "insofar as may be necessary to enable [that carrier] . . . to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission . . . ." 49 U.S.C. § 5(12)(1976), since recodified as 49 U.S.C. § 11341(a). That exemption, as its clear terms indicate, is limited, for it immunizes a carrier from only those laws as necessary to enable the

[10] Initially, the court vacated the ICC decisions in their entirety without a remand, and, thus, it was clearly unnecessary to reach the issue of the relationship of Sections 11341(a) and 11347. That siutation changed, however, once the court amended its decision to remand this case to the ICC for a hearing. Because it is aggrieved by a remand, respondent UTU asked this Court to issue a writ of certiorari to review that undecided issue (Sup. Ct. No. 85-983); that cross-petition is still pending.

carrier to effectuate an approved transaction. Section 11341(a)'s necessity limitation is an essential part of the statute and, if that provision is to operate effectively as a check on what would otherwise be an unlimited power, some tribunal must determine whether it is necessary to relieve a carrier of a conflicting federal law in order to enable a carrier to effectuate a consolidation transaction approved by the Commission.

In view of both the structure of the Interstate Commerce Act, including its grant of exclusive jurisdiction to the ICC in Section 11341(a) to approve consolidation transactions, and the fact that this grant of immunity depends upon the shape of the transaction as actually approved by the Commission, the Commission should be the tribunal which determines whether the exemption is necessary when it determines what is in fact being approved. This is consistent with the ICC's approach, for the Commission has in the past considered whether Section 11341(a) should operate to relieve a carrier of obligations under other laws. Since the Commission must make specific findings and supply an articulated basis for its conclusions, it must explain why it is necessary to relieve a carrier of its obligations under other federal laws, including the Railway Labor Act, in order to enable that carrier to effectuate the financial transaction authorized by its order.

Here, as the court of appeals concluded, the Commission did not make any findings, either in 1982 when it authorized the trackage rights at issue or in 1983 when it refused to clarify its order, to explain why it was necessary for the trackage rights tenants to use their own crews to perform their operations. Since the Commission has not supplied a reasoned basis to conclude that Missouri Pacific employees must be precluded from participating in the crew selection process, its decisions on this point cannot stand.

II. Section 11341(a)'s immunity provision is further limited to the jurisdiction which Congress has given the Commission over consolidations. The ICC may not authorize a carrier to do an act over which the Commission has no jurisdiction, and, thus, Section 11341(a) cannot be viewed as immunizing that act. Although Congress has required the Commission to consider and to protect the interests of employees when it determines whether a consolidation transaction is

consistent with the public interest, Congress has not given the ICC the authority to regulate rail labor relations arising from consolidations. Congress established a regulatory scheme for rail labor relations in the Railway Labor Act which is separate and distinct from the Interstate Commerce Act and the Commission's jurisdiction. This separate nature of the two regulatory schemes is clear from the Interstate Commerce Act itself, for only rail carriers can invoke the ICC's jurisdiction over consolidations, and if the ICC concludes that a carrier-initiated consolidation is consistent with the public interest, its approval order is purely permissive. Only the carriers may decide whether to accept or to reject that grant of authority; rail labor has no voice in whether the carrier should accept or reject the consolidation authority. It is contrary to elementary principles of statutory construction to assert that this form of statutory scheme also gives an administrative agency power to control and direct the conduct of a third party who has no voice in whether to accept or to reject the ICC's permissive order.

The most telling evidence that Section 11341(a) was never intended to extend to rail labor relations, including the Railway Labor Act, is the fact that for over sixty years during which two forms of regulation have existed side by side, the ICC had never concluded, until this case, that it should regulate a carrier's labor relations. In fact, its consistent position prior to this case was that the two forms of regulation were separate and distinct.

Any question as to whether the ICC had jurisdiction over rail labor relations matters was laid to rest in 1976 when Congress amended the Interstate Commerce Act to enhance the levels of protection which the ICC was required to impose each time the Commission approved a consolidation transaction. Since 1976, the ICC must include in the protective arrangement which it imposes, provisions that require carriers participating in an approved transaction to preserve collective bargaining rights of employees and to give all interested employees a voice in the crew selection process. Consequently, in the case at bar, the ICC's order cannot be viewed as relieving a carrier of its Railway Labor Act obligations, nor can that order be viewed as authorizing the carrier to deprive employees of a voice in the crew selection process.

ARGUMENT

1. Contrary To Petitioners' Assertions, Section 11341(a) Of The Interstate Commerce Act Does Not Operate In A Vacuum, But, Rather, Requires As A Predicate To Its Application An ICC Decision Which Supplies A Reasoned Basis To Conclude That A Carrier Has Been Relieved Of Its Obligations Under Another Federal Law

Petitioners ICC and MKT, joined by the United States and by our nation's railroads, argue that the court of appeals erred in reading Section 11341(a) of the Interstate Commerce Act, 49 U.S.C. § 11341(a), as requiring the Commission to supply a reasoned basis for purporting to relieve a carrier participating in a transaction approved under the Act's consolidation provisions, of its obligations under the Railway Labor Act, 45 U.S.C. § 151, *et seq.* According to petitioners and to their supporters, Section 11341(a) is self-executing and automatically operates to relieve a carrier of any obligation imposed by a federal or state law which might impede the effectuation of an approved transaction in the manner proposed to the Commission. That exemption, petitioners assert, applies even if the ICC never addressed the specific means chosen by the carrier to implement its authorization. Respondent UTU respectfully submits that petitioners' view of Section 11341(a) is without merit, for their reading of that immunity provision impermissibly expands the range of carrier actions within its scope, and effectively reads the "necessity" component out of that statute.

A. Section 11341(a) Is Limited And Requires A Necessity Determination

It is axiomatic that the "starting point" in any case involving the interpretation of a federal statute is the "language employed by Congress." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Where that language is clear, the inquiry into its meaning should cease, for Congress is presumed to have intended what the plain language of its statutes states. *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980). Moreover, since Section 11341(a) is in effect an implied repeal statute, it must not be expanded beyond its literal terms—*i.e.*, it must be construed narrowly. *E.g., Square*

D Co. v. Niagara Frontier Tariff Bureau, 476 U.S. ____, ____ 90 L.Ed.2d 413, 425 (1986); *accord, Watt v. Alaska*, 451 U.S. 259, 267 (1981). When those principles are applied to Section 11341(a), it becomes clear that this immunity provision is not as expansive as petitioners believe. Moreover, respondent UTU respectfully submits, the Interstate Commerce Act itself, prior decisions by this Court and past ICC practice all dictate that the ICC initially establish the scope of that immunity provision; this requires, as the court of appeals concluded, an ICC decision which supplies a reasoned basis for the application of Section 11341(a)'s immunity.

Section 11341(a) provides in pertinent part that: "A carrier . . . participating in [an] . . . approved . . . transaction is exempt from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction . . . and operate property . . . acquired through the transaction." 49 U.S.C. § 11341(a). That language provides today, as it essentially prescribed when first enacted in 1920,[11] that a railroad consummating a "transaction" approved by the ICC under the consolidation provisions of the Act (*i.e.*, 49 U.S.C. §§ 11342-11351) is relieved from the operation of all "restraints or prohibitions by law, State or Federal, in so far as may be necessary to enable [that railroad] . . . to do anything authorized . . . by any order" of the ICC under the consolidation provisions. Section 407 of the Transportation Act of 1920, *supra* note 11, 41 Stat. at 482; *compare,* 49 U.S.C. § 11341(a), *with*, § 7 of Transportation Act of 1940, *supra* note

[11] Section 11341(a) was first enacted as Section 5(8) of the Interstate Commerce Act by Section 407 of the Transportation Act of 1920, 41 Stat. 456, 482. It was subsequently reenacted with modifications by Section 202 of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 219, as Section 5(15) of the Interstate Commerce Act. Its last substantive change, except for an amendment in 1982 which is not relevant here (*see*, § 21(a) of the Bus Regulatory Reform Act of 1982, 96 Stat. 1102, 1122)), occurred in 1940 when it was reenacted as Section 5(11) of the Interstate Commerce Act by Section 7 of the Transportation Act of 1940, 54 Stat. 898, 908-09. Section 11341(a)'s current version is the result of the codification of the Interstate Commerce Act which was effected by Pub. L. No. 95-473, 92 Stat. 1337 (1978). That recodification, as stated in Section 3(a) of that Act, was intended to be without substantive change. 92 Stat. at 1466.

11, 54 Stat. at 908-09. Even if Section 11341(a) is viewed as being self-executing as petitioners assert, it is clear that Congress has limited Section 11341(a)'s application to only those laws which, if enforced, would prohibit a carrier from implementing the order of the ICC.

Since Section 11341(a) is limited, the logical question presented by that conclusion is whether any tribunal, and if so, which one, is to determine whether the exemption is necessary in a particular case. Petitioners, however, assert that no agency or court need make a necessity determination, either at the time that a transaction is approved or after, because, in petitioners' view, Section 11341(a)'s immunity is self-executing and automatically flows from the ICC's approval of a transaction as being in the public's interest. Prior approval necessity determinations, petitioners assert, are not contemplated by the Act because the Act requires simply that the transaction be consistent with the public interest. 49 U.S.C. § 11344(c). Post-approval proceedings, petitioners assert, are also contrary to the Act, for they assert that post-approval "necessity" proceedings would frustrate the "basic purpose" of the Act's consolidation provisions, which, according to petitioners, is to encourage carrier-initiated, voluntary consolidation plans. ICC Br. at 34-35. In other words, the carriers propose the manner in which they will effectuate a consolidation transaction, and if the Commission finds that transaction to be consistent with the public interest, the carriers will be relieved of all conflicting legal obligations and may implement their proposal, even if the transaction could be accomplished in another way which would be just as acceptable to the ICC and would not ignore those legal obligations. Respondent UTU disagrees with petitioners' argument, for such an expansive view of Section 11341(a) effectively writes the necessity component out of the law. *See, Texas & New Orleans R. Co. v. Brotherhood of Railroad Trainmen*, 307 F.2d 151, 159-60 (5th Cir. 1962), *cert. denied*, 371 U.S. 952 (1963). This was obviously not Congress' intent, for no statute should be read in such a way that limiting language is rendered superfluous. *National Insulation Transportation Committee v. ICC*, 683 F.2d 533, 537 (D.C. Cir. 1982).

Since the necessity component of Section 11341(a) is an essential part of the scope of that section, it must be considered by either the ICC or by a court which is subsequently called upon to enforce the obligation from which the railroads contend they have been made immune. Respondent UTU respectfully submits that the structure of the Interstate Commerce Act requires that it be the ICC which passes on this issue.

As the court of appeals noted in its decision, disputes over the application of Section 11341(a) have not frequently arisen, partly because the necessity for the waiver is usually clear. ICC App. at 16a. That is so, respondent UTU submits, because the need for a waiver depends upon the order of the Commission, and where the order of the agency clearly specifies what is to be performed, the application of Section 11341(a) should be obvious. *E.g., Texas v. United States*, 292 U.S. 522 (1934). However, where the order of the agency does not specify that an approved transaction is to be accomplished in a particular way which creates a conflict with other obligations, the justification for the waiver is not present. *Accord, Central New England Ry. v. Boston & Albany R.R.*, 279 U.S. 415, 420 (1929) ("without such a conflict [between legal obligations and an order of ICC which expressly mentions such an obligation], there could be no justification for holding that the order would also operate sub silentio to release a carrier from" its legal obligation). Indeed, this is apparent from the primary case relied upon by petitioners, *BLE v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963), for in that case the court quoted with approval and relied upon the ICC's statement in *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease*, 295 I.C.C. 696, 702 (1958), that although the Commission need not determine and declare that a carrier is relieved from particular laws, the agency must "'make clear what the carrier is authorized to do.'" 314 F.2d at 432.

Here, as the court of appeals observed, the ICC's order in 1982 approving the MKT and D&RGW trackage rights requests did not make clear the fact that the agency was also approving their crewing proposals. ICC App. at 13a n.3. In fact, rail labor reasonably believed that the carriers' trackage rights proposals, including the crewing provisions, were quali-

fied by the employee protective provisions which the ICC prescribed in its order, for those protective conditions were imposed as a condition of the ICC's grant of trackage rights. 366 I.C.C at 654, § 19. That limitation of the ICC's approval is not lessened by the Commission's approval of the trackage rights' proposals themselves; the MKT's and D&RGW's trackage rights request were approved only "to the extent and under the terms and conditions" stated in the decision and order. 366 I.C.C. at 654, § 14. Since those employee protective conditions required petitioner MKT and the D&RGW, along with the Missouri Pacific, to preserve collective bargaining rights and to give all interested employees a voice in the crew selection process,[12] it is simply incorrect to say that the ICC's order authorized MKT and D&RGW to deprive Missouri Pacific employees of whatever Railway Labor Act or statutory right they may have had to participate in the crew selection process. Consequently, at the very least the ICC did not make clear what the carrier was authorized to do.

Petitioners nevertheless assert that the need for the waiver is apparent because the MKT and D&RGW specified their crewing proposals in their trackage rights application. The short answer to this assertion, however, is that the carriers' applications are not the order of the Commission. *United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 445 (1951); *Southern Ry.—Control—Central of Ga. Ry., supra*, 331 I.C.C. at 165. Since the Commission granted those applications subject to the provisions of the employee protective conditions, inconsistent provisions in the application simply cannot be viewed as superseding the agency's order.

[12] Petitioners assume that the MKT's crewing proposal did not violate Article 1, Section 4 of the employee protective conditions which requires that the selection of forces shall be made on a basis provided by an agreement encompassing "all employees involved," because, in their opinion, Art. 1, § 4 does not give affected employees of one railroad the right to insist that another railroad involved in the transaction bargain with them. *See*, ICC Pet. at 8 n.4; MKT Br. at 7-8, 11 n.6. That assumption is false because, as the district court found in *Missouri Pac. R.R. v. UTU, supra*, ICC Pet. at 35 n.12, the plain terms of Art. 1, § 4 clearly provide for negotiations among all interested employees and railroads to devise a method to select forces fairly and equitably. That plain meaning is their intended meaning, for those provisions were devised from Sections 4 and 5 of the Washington Job Protection Agreement of 1936 (*see, New York Dock Ry. v. United States, supra*, 609 F.2d at 95) which the ICC concluded long ago required *all railroads* participating in a transaction to give advance notice to *all involved employees* and to negotiate an implementing agreement which apportions the adverse effect "among the employees of both railroads on the basis of an equitable and acceptable agreement." *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151, 166, 173 (1967).

Section 11341(a) grants carriers an immunity from inconsistent laws because Congress has intended that the ICC's authority over carrier consolidation proposals should be exclusive. 49 U.S.C. § 11341(a); *Texas v. United States, supra*, 292 U.S. at 531. While petitioner UTU submits that this exclusive authority does not extend to matters outside the Commission's jurisdiction (for example, Section 11341, *et seq.*, does not give the ICC authority over a carrier's labor relations), the scope of an ICC order is clearly a matter within the ICC's primary, if not exclusive, jurisdiction. *See generally, Engelhardt v. Consolidated Rail Corporation, et al.*, 756 F.2d 1368, 1369 (2d Cir. 1985); *Zapp v. UTU*, 727 F.2d 617, 625 (7th Cir. 1984). Moreover, if rail labor or any party sought to enforce rights which they contend were not immunized by Section 11341(a), the railroads would obviously assert that such a suit was a collateral attack on an ICC order; in view of 28 U.S.C. §§ 2321(a) and 2341, *et seq.*, the railroads' defense might succeed. *See, Railway Labor Executives' Assoc. v. Staten Island R.R.*, 792 F.2d 7 (2d Cir. 1986). Consequently, it logically follows that the current structure of the Interstate Commerce Act requires that the ICC be the tribunal to determine whether its order authorizes a carrier to perform an act which conflicts with other statutory obligations.

B. In Determining Whether A Carrier Is To Be Relieved Of Inconsistent Federal Laws, The ICC Must Supply A Reasoned Basis For Its Decision

Once it is accepted that the ICC has the responsibility to determine exactly what it is that the carriers in this case have been authorized to do, it follows, respondent UTU submits, that the agency must then supply a reasoned basis for its conclusion. Petitioner ICC is not a legislature, and, therefore, it must include in any decision that it renders under the consoli-

dation provisions of the Interstate Commerce Act "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record . . . ." 5 U.S.C. § 557(c)(A). If these findings or conclusions are not entered, a reviewing court must set aside the challenged agency action, for, as this Court has observed:

> "[A] simple but fundamental rule of administrative law . . . is . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action . . . ."

Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 169 (1962), *quoting, SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Petitioners do not challenge this principle, but they assert that there is no need for findings in this case because Section 11341(a) is self-executing and automatically flows from the agency's specification of exactly what a carrier is authorized to consummate. That argument, however, ignores the fact that, in specifying what a carrier is authorized to do, the Commission must make detailed findings and conclusions. Moreover, when an act authorized by the ICC as being within the public's interest conflicts with another federal law, the Commission must show that it considered the policies expressed in those laws in determining whether the relevant transaction is within the public's interest. *United States v. ICC*, 396 U.S. 491, 511-12 (1970); *Southern Pacific Transportation Co. v. ICC, supra*, 736 F.2d at 721 n.10. That determination, respondent UTU submits, requires the Commission to articulate its reasons and to show that it has considered the policies of the conflicting laws. *United States v. ICC, supra*, 396 U.S. at 514.

Relying upon *Schwabacher v. United States*, 334 U.S. 182 (1948), petitioners argue that the court of appeals erred in requiring the Commission to explain why it was necessary for the MKT and D&RGW to be relieved of whatever obligations

the Railway Labor Act might impose in connection with their crew proposals.[13] Petitioners assert that the agency must find only that the proposed transaction is within the public's interest, and its inquiry must end at that point, for "it is not open to the Commission to make judgments about which terms [devised by the applicants] were sufficiently 'necessary' to override other laws." ICC Br. at 30. Respondent UTU disagrees, for once again petitioners' construction of Section 11341(a) ignores the necessity component.

Schwabacher and cases dealing with Section 11341(a)'s antitrust immunity [14] do not support petitioners' argument, for each of those cases involved conflicts between matters committed to the complete control of the Commission and the applicable state or federal law. For example, in *Schwabacher* this Court observed that the state law at issue in that case dealt with an integral part of the capital structure of the railroad whereas the Interstate Commerce Act gave the ICC "complete control of the capital structure to result from a merger." 334 U.S. at 195. The concept of preemption which is so obviously reflected in Section 11341(a) requires that the federal law prevail over the State law. *Texas v. United States, supra*, 292 U.S. at 534-35. Moreover, Congressional intent to have the Interstate Commerce Act control is obviously true whenever a proposed merger conflicts with antitrust laws. In each of those cases, therefore, Congress had specified that the sole test to be applied in determining whether the matters in question should be approved was the public interest test, and, thus, there was no justification in those cases for adding a further test—*i.e.*, whether the exemption was necessary.

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[13] Echoing the dissent, petitioners assert that it was inexplicable for the court of appeals to have indulged the unions' belief that they had an established right to participate in the MKT's and D&RGW's crewing decisions. *E.g.*, ICC Br. at 23 n.16. What petitioners fail to recognize in making that assertion is that the ICC does not have jurisdiction to decide whether rail labor is correct in contending that there is a right under the Railway Labor Act to require the Missouri Pacific to negotiate on the issues at stake (*see, Order of R.R. Telegraphers v. Chicago & N.W. Ry.*, 363 U.S. 330 (1960)); rather, in determining whether § 11341(a) should apply to that asserted right, the ICC must assume that rail labor had such a right. *Schwabacher v. United States, supra*, 334 U.S. at 190.

[14] *E.g., United States v. ICC, supra.*

As explained in Argument II, *infra,* however, the case at bar does not involve a matter committed to the control of the ICC, but, rather, involves a matter which is at best related to the means which a carrier may choose to effectuate the transaction at issue—*i.e.*, the trackage rights. In such cases respondent UTU respectfully submits, the fact that Section 11341(a) must be construed narrowly because it is an implied repeal law, requires the Commission to examine the means proposed by the carrier to ascertain whether that is the only method by which the transaction can be accomplished. *E.g., City of Palestine v. United States,* 559 F.2d 408 (5th Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). Any other approach to a carrier proposal which involves an infringement upon rights granted by statute to third parties would give the railroad the ability to unilaterally decide which statutory obligation will become immunized by Section 11341(a); such an approach will allow the carrier to bind a nonconsenting third party even though another arrangement suitable to the third party would also have been acceptable to the Commission. Respondent UTU respectfully submits that Section 11341(a) was never intended to give the railroads such unbridled power over matters which involve parties who are not applicants. *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra,* 307 F.2d at 159-60.

This limited aspect of Section 11341(a)'s reach to matters which do not pose an obstacle to the effectuation of the acutal financial transaction, as contrasted with the means chosen by the carriers to implement that transaction, may be seen by examining the *City of Palestine* case. In that case, the Fifth Circuit was asked to review a decision of the Commission which had authorized under what is now Section 11341(a) the abrogation of an agreement which a subsidiary of the Missouri Pacific had entered into years before to keep certain employees, offices and shops in Palestine, Texas.[15] Missouri Pacific had proposed a corporate restructuring—*i.e.*, a merger—which contemplated moving those employees and facilities, and in authorizing that merger under what is now Section 11344, the ICC concluded that Missouri Pacific should be relieved of its obligations under that agreement because those obligations were contrary to the public interest as being a burden on interstate commerce. *Missouri Pac. R.R.—Merger,* 348 I.C.C. 414, 430 (1976), *rev'd in part, City of Palestine v. United States, supra.* Since it was clear that an abrogation of that agreement was not necessary to enable the corporate restructuring to be accomplished, the Fifth Circuit concluded that the ICC's decision was in excess of its powers under what is now Section 11341(a); as the court stated in 559 F.2d at 415:

> Congress allowed the ICC significant power to effectuate approved transactions, but it did not authorize gratuitous destruction of contractual relations—even when it serves the general public interest—when the destruction is irrelevant to the success of approved transactions.

That reasoning is clearly in keeping with decisions of this Court which have examined the scope of Section 11341(a)'s exemption, for in those few cases, as the court of appeals in this case observed, this Court has indicated that Section 11341(a) applies "only if those . . . laws pose an obstacle to the transaction." ICC App. at 17a. For example, in *Texas v. United States, supra,* this Court upheld an ICC order which authorized the lease of a railroad incorporated in Texas by a lease agreement that, as modified by the ICC order, authorized the lessee to relocate the lessor's general offices and shops, contrary to Texas law. In upholding that ICC order, however, this Court noted that the Commission's order did not nullify another Texas law which required the carriers to keep a public office in

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[15] Section 11341(a)'s limited reach, even according to the ICC, may also be seen from the fact that the ICC recognizes that this section does not apply to contracts between a carrier and a third party. *St. Louis S. Ry.—Purchase,*

(footnote continues)

(footnote continued)

363 I.C.C. 319, 367 (1980) ("we lack the power to modify trackage rights agreements executed prior to former Section 5(2)(a)'s [now, 49 U.S.C. 11343(a)] enactment in the Transportation Act of 1940"); *see also, Gulf, M. & O. R.R.—Abandonment,* 282 I.C.C. 311, 335 (1952). The Fifth Circuit in its *City of Palestine* decision did not overrule the ICC's view that Section 11341(a) did not apply to contracts, but rather, assumed for purposes of argument that the ICC could abrogate contracts. 559 F. 2d at 414.

Texas where various corporate records were to be maintained for public inspection. By limiting the exemption to solely the general office law—*i.e.*, one which if complied with "would entail unnecessary and burdensome expenditures in operation" (292 U.S. at 533)—this Court noted that: "There is no interference with the supervision of the State over the lessor in matters essentially of state concern, as distinguished from the operations in which their effect upon interstate commerce are of national concern." *Id.* Although petitioners attempt to belittle this Court's similar approach in *Callaway v. Benton*, 336 U.S. 132, 140-41 (1949), and *Seaboard Air Line R.R. v. Daniel*, 333 U.S. 118, 126 (1948) (*see*, MKT Br. at 34-35), petitioners have been unable to point to one case by this Court which squarely holds that Section 11341(a) gives railroads the power to structure their transactions so as to be immunized from laws which do not pose an obstacle to the effectuation of the approved financial transaction.

After being rebuffed by the Fifth Circuit in the *City of Palestine* case, petitioner ICC revised its formulation of when it should immunize a carrier from the operation of other laws.[16] On remand, the ICC noted that the Fifth Circuit's decision contained language which led the Missouri Pacific, in seeking a petition for a writ of certiorari, to describe that appellate court's decision as holding that "the Commission is limited by § 5(11) [now, § 11341(a)] and may nullify state law restraints only where the restraints would stand in the way of or absolutely prohibit a proposed consolidation." *Missouri Pac. R.R. v. City of Palestine* Sup. Ct. No. 77-870, Pet. at 13 (footnote omitted).

[16] Petitioner ICC claims that the court of appeals misspoke when it said that Congress has given the Commission broad powers to immunize transactions from later legal obstacles; according to petitioner, it is § 11341(a) and not the ICC which grants that immunity. ICC Br. at 19-20. Petitioner's semantic dispute is erroneous, for the ICC has stated before that it "can and should immunize" consolidations (*e.g.*, *Union Pac. Corp.—Control, supra*, 336 I.C. at 549), and it has also withheld or limited that section's immunity in other cases. *Sea-Land Service, Inc.—Control*, 348 I.C.C. 42, 59-52 (1975).

However, in the ICC's view that language was merely *dicta*.[17] According to the Commission, the Fifth Circuit's decision "stands for the narrower principle that the Commission may nullify only State law restraints that are materially related to a proposed merger or consolidation within the Commission's jurisdiction." *Missouri Pac. R.R.—Merger*, 354 I.C.C. 763, 764 (1978).[18] Petitioner ICC has applied that formulation of Section 11341(a) to this case. ICC Br. at 41 n.26.

Petitioner ICC's reliance on its "material terms" articulation as to the reach of Section 11341(a), even though erroneous as being too broad, proves two things which negate the ICC's arguments in this case. First, it shows that Section 11341(a) is not totally automatic, for it requires a showing of some degree of necessity over and above the public interest determination. And second, *Burlington Truck Lines, Inc. v. United States, supra*, requires as the court of appeals held, that the Commission supply a reasoned basis for that necessity conclusion. Here, as the the court of appeals noted, the ICC did not provide in this case, either in 1982 or in 1983, "a shred of reasoning to support its view that completion of the [trackage

[17] Such *dicta* included the court's statement that:

> [W]e conclude that the ICC's power only extends to setting aside state restraints to the effectuation of an approved section 5(2) transaction and no further. Although the Palestine Agreement may burden MoPac, the agreement clearly is not an obstacle to the merger . . . and does not threaten the merger's success.

559 F.2d at 414.

[18] The Commission's formulation of its standard in response to the *City of Palestine* decision was not unanimous; Chairman O'Neal took issue with the new formulation and stated:

> In exercising its authority under this section in the future, the Commission should apply a "substantial burden" test, to take jurisdiction in situations where the operation of a State law might not actually stop a section (5) [*sic*] transaction but where it might substantially impair, or reduce the benefits to the public interest resulting from the transaction. If the State law does not impose such a burden, the Commission should not seek to abrogate it.

354 I.C.C. at 765.

rights] transactions required shielding crew selection from the Railway Labor Act." ICC App. at 19a (footnote omitted).

Petitioners cannot avoid that conclusion by contending that the crew provisions of the trackage rights applications were "material terms" (ICC Br. at 41 n.26; MKT Br. at 33, 39-40), for that bare contention, as the court of appeals noted, does not supply the reasoned basis required by *Burlington Truck Lines* in this case. "[M]erely stating in totally conclusory terms that something is a 'material term' is inadequate to provide the basis for the conclusion that waiver is necessary to fruition of the transaction, as § 11341(a) requires." ICC App. at 19a n.7. As the court of appeals explained, this lack of a reasoned basis is "especially conspicuous in light of evidence suggesting that the [crew selection] issues would *not* interfere with the trackage rights." ICC App. at 19a-20a (emphasis in original). As the court summarized (*Id.* at 20a; footnote omitted):

> First, the Commission specifically left the question of trackage compensation open to later negotiation between the railroads, 366 ICC at 589-590; it never suggested why the question of crew selection was somehow so much more necessary to fruition of the transaction that normal Railway Labor Act procedures could not apply to the issue of crew selection. Second, ICC noted that MKT might find it necessary to use more crews than it suggested in its application, 366 ICC at 569-570; again, the Commission never suggested why the question of crew selection was so much more necessary to fruition of the transaction. On both of these issues, then, the Commission expressed a willingness to leave subsidiary trackage issues to later determination. Finally, the Denver & Rio Grande operated for some months with existing Missouri Pacific crews, and there has been no suggestion that the trackage rights were somehow frustrated as a result.

Petitioners' and the dissent's reliance on the fact that the pro-competitive aspects of the trackage rights requires the use

of the trackage rights tenant's own employees (*e.g.*, MKT Br. at 39-40) does not supply the reasoned basis, for essentially two reasons. First, there is no evidence in this record to show that Missouri Pacific employees would not perform the trackage rights operations as efficiently as MKT operating employees would; indeed, the D&RGW's successful use of Missouri Pacific employees belies petitioners' post hoc rationalization on this point. And second, as the court of appeals noted, the "ICC has never given the faintest hint of a reasoned explanation why crew selection is so essential to that purpose that the otherwise applicable provisions of the Railway Labor Act must be waived." ICC App. at 20a n.8. Since the ICC has not adopted petitioners' reasoning, counsel's arguments cannot be used to supply the missing articulated basis. *Burlington Truck Lines, Inc. v. United States, supra,* 371 U.S. at 168-69.

In short, the ICC's own use of Section 11341(a) in this case and in the past shows that the court of appeals was correct in concluding that Section 11341(a)'s immunity does not attach automatically to every proposal made by an applicant in its application to the Commission. Rather, the ICC must supply a reasoned basis to justify a railroad's subsequent claim that Section 11341(a) has relieved it of an otherwise binding obligation because such a grant of immunity is necessary to effectuate the approved financial transaction.

II. Section 11341(a)'s Grant of Exclusive Authority To The ICC Over Railroad Consolidations Does Not Give The Commission Jurisdiction To Regulate Labor Relations, Nor Does It Give That Agency The Power To Relieve A Rail Carrier Of Obligations Which Section 11347 Of The Interstate Commerce Act Requires Be Imposed To Protect The Interests Of Rail Carrier Employees

Besides relying upon their view of the self-executing nature of Section 11341(a), petitioners, the United States and the *amici curiae* go further and assert that the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, must give way to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, for the need for such

an exemption is clear. That need is clear, petitioners and *amici* assert, because the major dispute[19] resolution procedures—*i.e.*, the procedures which would be applicable in arriving at changes in working conditions after a consolidation transaction is effectuated—are purposefully "long and drawn out" (*e.g.*, *Brotherhood of Railway Clerks v. Florida East Coast Ry.*, 384 U.S. 238, 246 (1966)) and do not insure that the parties will arrive at an agreement since there is no requirement in the Railway Labor Act for compulsory arbitration of such disputes. *See*, ICC Br. at 37-38 n.24. Respondent UTU respectfully submits that petitioners' arguments concerning the interrelationship between the Railway Labor Act and the Interstate Commerce Act are without merit, for these arguments ignore the fact that Congress has not given the Commission the power to regulate a railroad's labor relations. Moreover, any belief that the Commission has such power has been laid to rest by the 1976 amendments[20] to what is now Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347, which commands that the fair arrangement which the ICC must impose as a condition of its approval of any rail consolidation to protect the interests of employees, require rail carriers to preserve collective bargaining rights and to give all interested employees a voice in the crew selection process. Consequently, it is simply erroneous to contend, as petitioners do here, that the Commission could approve a transaction which authorizes a rail carrier to ignore its obligations under the Railway Labor Act or under the crew selection process of the ICC imposed employee protective provisions.

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[19] A "major dispute" under the Railway Labor Act is one over the formation of new or modified rates of pay, rules of working conditions which will apply once an agreement is reached. This is to be distinguished from a "minor dispute"—*i.e.*, a dispute over the interpretation or application of an existing agreement—because minor disputes unresolved after conferences between the parties are to be settled by Adjustment Boards which is a form of compulsory arbitration. *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945). Major disputes are to be conferenced, mediated and resolved by negotiations and, if necessary, resort to self-help. Section 7, First of the Act, 45 U.S.C. § 157, First, prohibits compulsory arbitration of major disputes.

[20] Section 402(a) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 62, amended Section 5(2)(f) of the Interstate Commerce Act, now § 11347. *See*, page 46, *infra*.

A. The Commission's Jurisdiction Over Rail Consolidations Does Not Give That Agency The Power To Regulate A Rail Carrier's Labor Relations

While Section 11341(a) provides that the ICC's "authority . . . under this subchapter [*i.e.*, Subchapter III of Chapter 113] is exclusive" (49 U.S.C. § 11341(a)), it should be apparent that this exclusive authority extends only to matters over which Congress has given the ICC jurisdiction under the Interstate Commerce Act's consolidation procedures. Indeed, that is the plain import of the language which Congress used in Section 11341(a), both now and since its last substantive amendment on this point in 1940. *See* note 11, *supra*. As pertinent here, that jurisdiction is defined in Section 11343(a) of the Act, 49 U.S.C. 11343(a), where Congress has provided that:

> The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I . . . of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:
>
> (6) acquisition by a rail carrier of trackage rights over . . . a railroad line . . . owned or operated by another rail carrier.

Petitioners give the ICC's jurisdiction a broad reach and assert that approval of a consolidation confers an exemption of sufficient breadth to permit implementation of the "terms" of the transaction as proposed by the carrier in its application for approval. ICC Br. at 28. Petitioners further assert that this exclusive jurisdiction extends to labor relations matters, for they contend that there is a clear need for the Commission "to prescribe the methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest." ICC Br. at 28 n.18. Respondent UTU respectfully submits that the ICC's belief that there is a clear need for it to act as a labor board does not equal congressional approval of such jurisdiction. Indeed, Congress has spoken on this subject by enacting the Railway Labor Act, and that Act, which regulates labor

relations in the rail industry, does not give the ICC any role in enforcing or prescribing that regulation.[21]

Petitioners' view that there is an overlap of jurisdiction by virtue of the ICC's jurisdiction over consolidations is inaccurate, for the legislative history of the rail consolidation provisions of the Interstate Commerce Act shows that Congress has always viewed the ICC's jurisdiction as not extending to labor relations matters. Railroads have been subject to federal regulation as an industry for almost 100 years (*see*, Act of February 4, 1887, 24 Stat. 379), and during virtually that same time period, Congress has also regulated rail labor relations. *E.g.*, Arbitration Act of 1888, 25 Stat. 501. Rail regulation by the ICC became more extensive after the railroads were returned to private ownership by the Transportation Act of 1920, 41 Stat. 456, but Congress has never given the ICC control over labor relations matters, even though such control has been proposed on several occasions. *E.g.*, H.D. Wolf, THE RAILROAD LABOR BOARD, Chap XV (University of Chicago Press, 1927).

Although Congress has long recognized that stable labor relations are essential to an efficient national rail transportation system and that there is an overlap between this goal and sound financial regulation by the ICC (*e.g., United States v. Lowden*, 308 U.S. 225, 235-36 (1939)), Congress has nevertheless treated the two forms of regulation separately. For example, while Title IV of the Transportation Act of 1920 made extensive amendments to the Interstate Commerce Act, including adding for the first time the predecessor of what is now Section 11341(a), Title III of that Act created the Labor Board to investigate and to report on rail labor disputes; it provided for voluntary adjustment boards to consider minor disputes; and it required both rail labor and management to exert every reasonable effort to avoid any interruption to the operation of

[21] Congress gave the ICC, however, a limited role under the Railway Labor Act. First, the ICC is to determine whether an electric powered railroad is a "carrier" within the meaning of Section 1, First of the Act, 45 U.S.C. § 151, First. And second, the ICC is to establish classifications of employees, but is not to define the crafts according to which employees may be organized. 45 U.S.C. § 151, Fifth.

any carrier. 41 Stat. at 469. There is no indication in the Transportation Act of 1920 that Congress also intended to give the ICC exclusive jurisdiction over labor relations matters to the exclusion of the Labor Board or adjustment boards, when it first enacted in that Act what is now Section 11341(a). Indeed, by placing the two forms of regulation in separate titles of that Act, it must be presumed that the ICC's exclusive authority over consolidations did not include jurisdiction over labor relations matters.

This separateness between the two forms of regulation is borne out by the Emergency Railroad Transportation Act of 1933 [hereinafter, "ERTA"], 48 Stat. 211. As shown above (*see* note 11, *supra*), Congress reenacted in Section 202 of that Act what is now Section 11341(a) as part of its grant of jurisdiction to the ICC over railroad consolidations. *See, Texas v. United States, supra*, 292 U.S. at 534-35. That Act also created the office of the Federal Coordinator of Transportation who was given the specific authority "to encourage and promote or *require* action" on the part of railroads to "avoid unnecessary duplication of services and facilities . . . [and] avoid other wastes and preventable expense . . . ." Section 4 of ERTA, 48 Stat. at 212 (emphasis added). Congress also gave orders of the Coordinator an immunity similar to that reenacted for ICC consolidation orders, but it specifically limited that immunity in several respects. First, laws "for the protection of the public health or safety" were not to be waived; and, as relevant here: "[N]othing herein shall be construed to repeal, amend, suspend, or modify any of the requirements of the Railway Labor Act or the duties and obligations imposed thereunder or through contracts entered into in accordance with the provisions of said Act." Section 10(a), ERTA, 48 Stat. at 215; *see also*, Section 10(b), 48 Stat. at 215.

Petitioner MKT asserts that Congress' failure to include in what is now Section 11341(a) an express statement that the ICC's immunity power does not extend to the Railway Labor Act, is "an evident recognition of the fact that no such exception was implicit in" what is now Section 11341(a). MKT Br. at 24. That assertion is erroneous, for petitioner MKT has failed to

take into account the broader jurisdiction which the Coordinator had, as compared with that given to the ICC. As this Court has stated before:

> From the initial enactment in the Transportation Act of 1920 . . ., to the most recent comprehensive re-examination of these provisions in the Transportation Act of 1940 . . ., Congress has consistently and insistently denied the Interstate Commerce Commission the power to take the initiative in getting one railroad to turn over its properties to another railroad. . . . The role of the Commission in this regard has traditionally been confined to approving or disapproving mergers proposed by the railroads to be merged.

St. Joe Paper Co. v. Atlantic Coast Line R.R., 347 U.S. 298, 305 (1954). Moreover, in passing on the validity of a consolidation transaction proposed by the railroads, the Commission's jurisdiction is limited to the financial transactions specified in Section 11343(a). The Coordinator, however, had the authority to require carriers to take certain actions and his jurisdiction ran to all matters which could permit railroads to operate more economically.

Congress recognized the Coordinator's broader jurisdiction could cover labor relations matters and it provided certain protections for employees, including advance notice of orders which will affect the interests of employees (Section 7(a)); a prohibition on reductions in number of jobs by reason of any action taken pursuant to the authority of the Coordinator (Section 7(b)); a guarantee against individual employees being deprived of employment or placed in a worse position with respect to compensation by reason of any action taken pursuant to authority of the Coordinator (*Id.*); and a specific recognition that the Coordinator's orders did not supersede the Railway Labor Act. Section 10(a). A comparable limitation on the scope of what is now Section 11341(a)'s immunity as not affecting Railway Labor Act rights was not necessary, for the simple reason that Congress had not even arguably given the ICC jurisdiction over labor relations matters.

Petitioners seek to find that jurisdiction by referring to the requirement in Section 11344(b)(1)(D) of the Interstate Commerce Act, 49 U.S.C. 11344(b)(1)(D), that in considering the public interest in certain consolidation proceedings, the ICC must consider "the interest of carrier employees affected by the proposed transaction." ICC Br. at 28 n.18. Petitioner MKT also refers to the passage of what is now Section 11347 during Congress' consideration of the Transportation Act of 1940 and argues that Congress' rejection of the Harrington Amendment [22] shows that Congress intended to allow carriers to implement consolidations irrespective of the fact that the ICC's approval might result in the unilateral alteration of working conditions "as long as those employees were compensated fairly under the Commission's labor protective conditions." MKT Br. at 31. Those assertions are without merit, for the Transportation Act of 1940 required the ICC to consider as part of its public interest determination the impact of the proposed transaction on employees, and to impose a fair and equitable arrangement "*to protect* the interests of the railroad employees affected" by the transaction. Section 7 of the Transportation Act of 1940, 54 Stat. 899, 906-07, adding 49 U.S.C. 5(2)(b) (emphasis added). It did not authorize the abrogation of employee rights.

Those concepts were not new in 1940, for the Commission had recognized since 1934 that the impact of a transaction on employees was an integral part of the public interest to be considered in deciding whether to approve a transaction (*St. Paul Bridge & Terminal Ry.—Control*, 199 I.C.C. 588, 596 (1934)), and for several years prior to 1940, it was imposing an arrangement to protect employee interests as a condition of its

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[22] Representative Harrington proposed that the Commission could not approve a transaction "if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882 (1939). Rep. Harrington's amendment was eventually rejected and in its stead Congress included a requirement that the protective arrangement required to be imposed by Section 5(2)(f) as added by the Transportation Act of 1940 must provide at the minimum that affected employees receive at least a four year guarantee against being placed in a worse position with respect to compensation. *See, Brotherhood of Maintenance of Way Employes v. United States*, 366 U.S. 169, 174 (1961).

consolidation approvals. *See, United States v. Lowden, supra.* Employee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to provide the economic benefits which consolidations could achieve for railroads. *ICC v. Railway Labor Executives' Assoc.*, 315 U.S. 373, 377-79 (1942); *United States v. Lowden, supra,* 308 U.S. at 235-36. Requiring the ICC to consider and to protect the interests of employees is far different than allowing the Commission to authorize new rates of pay, rules, or working conditions, for the former is directed to the parties seeking ICC approval of a consolidation transaction—*i.e.*, the carriers—whereas the latter requires the ICC to direct rail labor to take certain action. As the ICC has said before:

> [U]nder section 5 of the Act [now § 11341, *et seq.*] we merely authorize or permit the applicant carriers to enter into a proposed transaction. We may not even compel the carriers to consummate an authorized transaction. . . .
>
> Under section 5(2)(f) of the Act, we are "required" to impose upon the carriers in each approved transaction conditions for the protection of railroad emplyees affected. But this section only authorizes the imposition of duties upon the carrier. It does not authorize us to direct the employees or organizations of employees to do anything . . . .

Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, supra, 295 I.C.C. at 701. Congress, respondent UTU respectfully submits, intended labor relations matters arising from a consolidation to be resolved by the procedures of the Railway Labor Act. *See generally, Air Line Pilots Assoc. v. CAB*, 667 F.2d 181 (D.C. Cir. 1981); *Delta Air Lines, Inc. v. CAB*, 543 F.2d 247, 260 (D.C. Cir. 1976)(Civil Aeronautics Board's jurisdiction over airlines does not extend to safety matters which are subject to jurisdiction of Federal Aviation Administration).

Respondent UTU's position that the ICC does not have jurisdiction over labor relations matters is supported by the ICC's treatment of the supposed conflict between the Interstate Commerce Act and the Railway Labor Act prior to 1983. Between 1940 and 1983, rail carriers occasionally argued before the Commission that the Interstate Commerce Act, by virtue of what is now § 11341(a), relieved the railroad of the obligations under the Railway Labor Act. However, in each case the ICC refused to find such a result. For example, in *Chicago, St. Paul, Minneapolis & Omaha Ry.—Lease, supra,* the carrier which leased and operated the properties of another railroad pursuant to an ICC order, sought a ruling by the Commission that the order had relieved it of whatever obligation the Railway Labor Act, and in particular, Section 6 of the Act, 45 U.S.C. § 156, might impose upon it to negotiate with employees over the manner in which it would integrate its operations with those of the leased carrier. According to the railroad, its original application had proposed an integration of the physical operations and the ICC's order was premised upon that assumption. 295 I.C.C. at 699. Consequently, the carrier asserted, what is now Section 11341(a) applied and relieved it of its obligations under Section 6 of the Railway Labor Act. 295 I.C.C. at 698-99. The carrier's request for a declaration that it was relieved of its Railway Labor Act obligations was denied. 295 I.C.C. at 702. After stating that it found nothing in the Act's consolidation provisions and, in particular, in the immunity provision, which "authorizes us to determine and declare the particular laws" immunized, the ICC added:

> Congress has not conferred upon us the power to determine the disputes which are subject to the Railway Labor Act or questions regarding the jurisdiction of the National Mediation Board, which, in effect, is what North Western [*i.e.*, the carrier] requests us to do.
>
> It is apparent that the Railway Labor Act has not prevented the North Western from effectuating the transaction authorized by the prior order. That order authorized the lease by North Western of the lines of railroad and other properties owned, used, or

> operated by the Omaha, and this has been accomplished.

Here, as in the *Chicago, St. Paul* case, it is apparent that the Railway Labor Act would not prevent the trackage rights tenants from effectuating the financial transaction authorized—*i.e.*, the transfer of the right to operate over the lines of the Missouri Pacific and Union Pacific.

In *Southern Ry.—Control—Central of Ga. Ry.*, 331 I.C.C. 151 (1967) (Report on Remand), the ICC was faced with an assertion by the Southern Railway that the Commission's control order and the employee protection imposed by that order superseded whatever rights collective bargaining agreements gave to employees. 331 I.C.C. at 168. That assertion was rejected by the Commission:

> [U]nder section 5(2)(f), we impose formulae of protective conditions *upon the carriers* seeking specific permissive authority under section 5(2) of the act, the purpose being to *protect* the interests of employees some of which in a particular case may well have been established under bargaining agreements executed pursuant to the Railway Labor Act. Rights obtained by employees under section 5(2)(f) are the minimum protection which an applicant carrier must provide in order to obtain this Commission's approval of its transaction. They are not, however, the maximum rights employees may gain. . . . The rights of railroad employees under their collective bargaining agreements, under the Washington Agreement, and under the protective conditions imposed upon the carrier under section 5(2)(f) are independent, separate, and distinct rights. . . . The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees. . . . These protective conditions imposed upon carriers under section 5(2)(f) which provide affected employees compensatory protections for wages, fringe benefits and other losses are designed to apply after the carriers have arrived at their

> adjustments of labor forces *in accordance* with the governing provisions of their collective bargaining agreements so that the carriers may be enabled to carry an approved transaction into effect. . . .
>
> . . . By its terms, section 5(11) [now, Section 11341(a)] applies only to antitrust and other restraints of law from carrying "into effect the transactions so approved . . .". Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed section 5 transactions have been successfully consummated in full compliance with such terms. . . . The essential problem to be resolved is an accommodation of laws, a role not foreign to us in section 5 transactions. . . . When balancing the national policy as to transportation with that of labor relations, we "act in a most delicate area . . . [and] policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other." . . .
>
> The designated "exclusive and plenary power" of the Commission in section 5(11) cannot be so broadly construed as to brush aside all laws—be they statutorily created antitrust laws or voluntary contractual agreements made binding by the force of law. . . .

Southern Ry.—Control—Central of Ga. Ry., supra, 331 I.C.C. at 169-70 (emphasis in original). *See also, Norfolk & Western Ry.—Merger*, 347 I.C.C. 506, 511 (1974). Respondent UTU is not aware of one case prior to the case at bar in which the ICC held that the Railway Labor Act was an obstacle to a transaction and must give way to the Interstate Commerce Act.

Respondent UTU's position as to the limited nature of the ICC's exclusive jurisdiction under Section 11341(a) is supported by the Fifth Circuit's decision in *Texas & New Orleans R.R. v. Brotherhood of Railroad Trainmen, supra*, in which the railroads sought to enjoin a strike by rail labor over the carriers' refusal to negotiate under the Railway Labor Act changes in

working conditions resulting from an ICC approved consolidation transaction. 307 F.2d at 158. As the Fifth Circuit observed, the railroads included in their application to the ICC "such detail . . . as to determine the major provisions of a new labor contract [to govern the new operations], although at no time were the unions brought into the negotiation of these agreements." *Id.* As occurred here (*Id.*):

> The appellants then argue that ICC approval of the agreements makes them binding on the unions. If so, not only does section 5 give the Commission power to approve a section 5(2) transaction, but it gives the carriers the right to legislate the terms of a continuing contract with a third party, although a different contract more favorable to the third party might have been equally acceptable to the Commission. We do not feel the statute may be so interpreted.

To support their arguments that the Interstate Commerce Act supersedes the Railway Labor Act, petitioners rely upon *Brotherhood of Locomotive Engineers v. Chicago & North Western Ry.*, 314 F.2d 424 (8th Cir.), *cert. denied*, 375 U.S. 819 (1963). In that case, the court did conclude that Section 11341(a)'s predecessor relieved a carrier of its Railway Labor Act obligations (314 F.2d at 432), but the facts relied upon by the court substantially lessen its value to petitioners in this case. In *Chicago & North Western*, the Eighth Circuit was faced with the question of whether the BLE was bound by an agreement which its representative had entered into to protect employees affected by the ICC approved transaction. 314 F.2d at 427. That agreement provided for arbitration of seniority integration disputes. *Id.* The BLE asserted that the arbitration provision of that agreement did not apply, but rather, it contended, the carriers had to comply with the Railway Labor Act's major dispute procedures to resolve the integration dispute. 314 F.2d at 428. Relying upon those facts (314 F.2d at 434), the Eighth Circuit held that the BLE was barred by what is now Section 11341(a) from asserting that the Railway Labor Act prohibited enforcement of the arbitration provision to which it had agreed. 314 F.2d at 433. In reaching that conclusion, the Court noted that: "In effect the stipulation [*i.e.*, protective agreement]

provides substantially the same machinery for arbitration that exists under § 7 of the Railway Labor Act . . . ." *Id.* That same observation is not true in this case.

Disregarding its pre-1983 consistent view of its limited role over labor relations, petitioner ICC contends that the employee protective provisions imposed under 49 U.S.C. § 11347 "ensure that inability of the parties to agree upon changes in working conditions necessary to Commission-approved transactions will not prevent the approved transaction from being implemented." ICC Br. at 34 n.21. That result is achieved, petitioners contend, by the fact that in their opinion the protective conditions provide for the compulsory arbitration of changes in rules and working conditions which the carrier wishes to make in implementing the operational changes associated with a transaction approved by the ICC. ICC Br. at 37-38 n.24. Besides being a very recent position of the ICC (*see, In re Norfolk & Western Ry., et al.*, Arbitration under Art. 1, § 4 of *New York Dock* conditions (N.H. Zumas, Referee) (a copy of that arbitration award is reproduced hereto as Appendix A)), that view of the ICC's authority over labor relations is erroneous and graphically shows the error of the Commission's construction of its authority under Section 11341(a).[23]

In the ninety-eight years that Congress has been regulating rail labor relations, Congress has refused to compel the arbitration of major disputes. Indeed, Section 7, First of the Railway Labor Act, 45 U.S.C. § 157, First provides: "That the failure or refusal of either party to submit a controversy [over rates of pay, rules, or working conditions] to arbitration shall

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[23] As the ICC has explained before, employee protective conditions are imposed on *carriers* and not employees. Those conditions, the UTU submits, supplement existing employee rights and give rail employees on one carrier involved in a transaction the right to require other carriers to bargain with them over the selection of forces. This cross-carrier bargaining right does not exist under the Railway Labor Act. *Central Vermont Ry. v. BMWE*, D.C. Cir. No. 86-5245, decided May 14, 1986, opinion issued June 27, 1986. If rail labor exercises that cross-carrier bargaining right, it does so with the knowledge that disputes over the terms of the selection of forces agreement unresolved by negotiation must be arbitrated. Respondent UTU submits that until this case, it was well recognized that such an arbitration could not modify existing agreements. Appendix A at 16a.

not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise." Also, Congress has concluded that in order to encourage compromise, which is inevitably necessary to reach an agreement, neither rail management nor labor can change the status quo during the negotiation and mediation phases of the compulsory bargaining. 45 U.S.C. §§ 152, Seventh, 155, First and 156. Those status quo requirements are, as this Court has stated, central to the design of this labor statute. *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 150 (1969). As this Court has explained:

> The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned, these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce . . . .

Terminal Railroad Assoc. v. Brotherhood of Railroad Trainmen, 318 U.S. 1, 6 (1943) (footnote omitted).

Whether judged by Section 11341(a) or by general conflict of laws principles, it is clear that the Interstate Commerce Act does not conflict with the Railway Labor Act, for the goals of both are compatible. As this Court has stated before, repeals by implications "are not favored" (*e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974)) and will not be found to exist unless the intention of the legislature to repeal is clear and manifest. *Watt v. Alaska, supra*, 451 U.S. at 267. Indeed, federal courts "must read the statutes to give effect to each if we can do so while preserving their sense and purpose." *Id.* Here, petitioners have made no attempt to read the Interstate Commerce Act's

consolidation provisions together with the commands of the Railway Labor Act, but the fact that the two Acts have existed side-by-side without a conflict for more than fifty years prior to this case shows that the two Acts can be read so as to give effect to each.

Imposed changes, such as those mandated in this case by the ICC, or even arbitrated changes imposed over the objections of employees as occurred in the arbitration award attached to this brief as Appendix B (*In re Norfolk & Western Ry., et al.*, Arbitration under Art. 1, § 4 *Mendocino Coast* conditions (R.J. Ables, Referee)), are contrary to the Railway Labor Act. More important, they bring with them a threat to uninterrupted commerce and a "loss of employee morale when the demands of justice are ignored." *United States v. Lowden, supra*, 308 U.S. at 236. Both results are contrary to the goals of the Interstate Commerce Act. *See, ICC v. Railway Labor Executives' Assoc., supra*, 315 U.S. at 377. As this Court has explained before in a comparable situation:

> The Commission acts in a most delicate area here [*i.e.*, a strike situation where it was asked to certify a replacement motor carrier], because whatever it does affirmatively . . . may have important consequences upon the collective bargaining processes between the union and the employer. The policies of the Interstate Commerce Act and the labor act necessarily must be accommodated, one to the other.

Burlington Truck Lines, Inc. v. United States, supra, 371 U.S. at 172-73. Unfortunately, by concentrating solely on a speedy implementation of all aspects of an approved transaction, and by ignoring the limits of its jurisidiction, the ICC has made no attempt to accommodate the policies of the two statutes.

B. Section 11347 Prohibits The ICC From Relieving A Carrier Of Its Railway Labor Act Obligations

Whatever questions may have existed as to whether the ICC had jurisdiction over labor relations matters were laid to rest by the 1976 amendments to the Interstate Commerce Act. In 1976, Congress made extensive revisions to the Interstate

Commerce Act in the Railroad Revitalization and Regulatory Reform Act of 1976 [hereinafter, "4R Act"], Pub. L. No. 94-210, 90 Stat. 31, including an amendment to what is now Section 11347 to require the Commission to increase the levels of protection which it routinely imposed in consolidation cases.[24] 4R Act, § 402(a), 90 Stat. at 62. That amendment provided that the arrangement which the ICC was to impose in all consolidation approvals "shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 405 of the Rail Passenger Service Act (45 U.S.C. 565)." 90 Stat. at 62.

As it now reads, Section 11347 requires the ICC to condition *all* rail consolidation approval orders by requiring the applicants "to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45." 49 U.S.C. § 11347. According to the ICC, the employee protective provisions imposed in 1982 provide those minimum levels of protection. Since Section 11341(a) immunizes carriers from federal laws "insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission" (Section 7 of Transportation Act of 1940, adding 49 U.S.C. § 5(11), 54 Stat. at 908), it follows that Section 11341(a) cannot relieve carriers of whatever obligations are imposed upon them pursuant to Section 11347.

Those obligations include the requirement in Article 1, Section 4 of the current employee protective conditions that rail carriers participating in a transaction, which may cause the rearrangement of forces, shall give advance notice of the "transaction"—*i.e.*, the acquisition of trackage rights or, in purchase, merger and control cases, any action taken pursuant to authorization of ICC (Art. 1, § 1(a), 354 I.C.C. at 610; 360

[24] Congress also made employee protection mandatory in abandonment cases under what is now 49 U.S.C. § 10903 and required the same levels of protection as it added to the consolidation provisions. 4R Act, § 802, 90 Stat. at 127-28.

I.C.C. at 84)—and, if requested, must negotiate an agreement to "provide for the selection of forces from all employees involved on basis accepted as appropriate for application in the particular case . . . ." Art. 1, § 4 of *Norfolk & Western* conditions, 354 I.C.C. at 610. As the Commission's decision in the *Southern Ry.—Control, supra,* case shows, that notice must be given to employees of all carriers involved in the transaction. A failure to give that notice has devastating effects on the employees excluded, and, thus, the notice and subsequent negotiation are an "indispensable prerequisite" to a valid order of approval under the consolidation provisions of the Act. 331 I.C.C. at 166. Moreover, the 1976 amendments require the imposition of those provisions established under Section 405(b) of the Rail Passenger Service Act, 45 U.S.C. § 565(b) to "preserv[e] . . . rights, privileges, and benefits . . . to such employees under existing collective-bargaining agreements or otherwise; [and] (2) [to] continu[e] . . . collective-bargaining rights . . . ." Article 1, Section 2 of the employee protective conditions implements that requirement by providing that:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits . . . of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

Art. 1, § 2 of *Norfolk & Western* Conditions, 354 I.C.C. at 610. Both of those requirements (*i.e.*, Art. 1, §§ 2 and 4 of the *Norfolk & Western* conditions) are derived from, and indeed are virtually identical to, provisions established pursuant to Section 405 of the Rail Passenger Service Act—*i.e.*, the Appendix C-1 conditions—and are, thus, minimum levels of protection which are required to be imposed as a condition on any consolidation appoval. *E.g., Railway Labor Executives' Assoc. v. United States, supra,* 675 F.2d at 1251; *New York Dock Ry. v. United States, supra,* 609 F.2d at 94; *accord, Railway Labor Executives' Assoc. v. United States,* 339 U.S. 142 (1950).

As the unambiguous language of Article 1, Section 2 of the employee protective conditions shows, railroads involved in a

transaction upon which that condition has been imposed must implement the approved transaction in such a manner so as to preserve existing collective bargaining rights and agreements of employees, including employee rights under the Railway Labor Act. Although railroads have urged implementing agreement arbitrators since the passage of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, to modify existing collective bargaining agreements, those arbitrators, until 1983, had almost uniformly concluded that they did not have such jurisdiction, mainly because of Article 1, Section 2 of the employee protective conditions. *E.g.*, App. A at 16a. That construction of Article 1, Section 2 is clearly consistent with its "legislative history," for as the *amici* have shown, the statutory predicate for Article 1, Section 2—*i.e.*, 45 U.S.C. § 565(b)(1) and (2)—was derived from Section 13(c) of the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1609(c). Amici Br. at 27. As the *amici* concedes (*id.*), the purpose of Section 13(c)'s collective bargaining rights requirement was to require the companies involved in a transfer "to preserve" those rights, not to facilitate their abrogation.

In this case, the ICC noted, "standard labor protection conditions generally preserve working conditions and collective bargaining agreements." ICC Decision of October 25, 1983, at 6; ICC App. at 59a. However, the ICC then qualified that correct reading of the protection by stating that:

> The terms of those conditions . . . must be read in conjunction with our decision authorizing the involved transaction and the underlying statutory scheme. To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction.

Id. at 59a-60a. That view of the relationship between collective bargaining rights and the effect of an ICC order is clearly based on the Commission's erroneous belief that it has jurisdiction over labor relations matters and that Section 11341(a) operates to relieve a carrier of any Railway Labor Act obligation that might impede implementation of the transaction in the manner

proposed by the carrier. Respondent UTU respectfully submits that the Commission's expansive view of its authority totally fails to recognize that the 1976 amendments to what is now Section 11347 prohibit it from approving any consolidation transaction which the applicants intend to implement in a manner that abrogates collective bargaining rights. Consequently, it is erroneous to assert that collective bargaining rights must give way to implementation of a transaction approved by the Commission.

Petitioner MKT and *amici* argue that if Congress had intended the 4R Act to have such a major intent on the ICC's jurisdiction over consolidations as respondent UTU urges, there would have been some reference to that impact in the Act's legislative history. Since, they believe, Congress was totally silent on this issue, Congress, they assert, could not have intended such a limitation on the ICC's jurisdiction. *E.g.*, Amici Br. at 26. *Amici* and petitioner MKT, however, have approached Congress' "silence" in 1976 with an erroneous view of pre-1976 law, for they ignore the fact that the ICC's 1967 *Southern Ry.—Control* decision represented the ICC's longstanding interpretation of its authority, and they fail to recognize that prior to 1983 rail labor had never been forced to arbitrate work rule changes as has occurred since the ICC's decision in this case. *See*, App. B. As this Court has noted before: "In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

Here, however, Congress was not totally silent, for it was urged by rail labor to require the ICC to improve its protective conditions (*e.g.*, Railroads—1975: *Hearings on S.793, et al., Before Senate Committee on Commerce*, 94th Congress., 1st Sess. at 1105 (1975) (Statement of William G. Mahoney)), and it granted rail labor's request because: "If we are to have a fair rationalization of the rail system in the United States, then adequate protection of jobs must be afforded those who choose a career in railroad jobs." H. Rpt. No. 94-725, 94th Cong., 1st Sess. at 75 (1975) (commenting on amendment to abandonment provisions). The amendments which Congress enacted in

1976 clearly required all subsequent ICC protective conditions to preserve and to continue collective bargaining rights. Congress' intent could not have been clearer.

On the other hand, if Congress intended in 1976 or 1940 to give the ICC jurisdiction over labor relations matters and to require compulsory arbitration or the unilateral abrogation of rules and agreements, that would have been a major change in policy which should require a clear expression of congressional intent before it can be implied. *Watt v. Alaska, supra,* 451 U.S. at 270-71; *Edmonds v. Compagnie Generale Transatl.,* 443 U.S. 256, 266-67 (1979). Since no such expression of congressional intent to abandon almost a century old policy of not compelling arbitration of major disputes can be found in the numerous Acts of Congress modifying the Interstate Commerce Act, it is improper to conclude, as petitioners do, that Congress has given the ICC such an abhorent power.

CONCLUSION

For the reasons set forth herein, the judgment of the court of appeals should be affirmed and this case should be remanded to the ICC with instructions to give full recognition to the requirements of 49 U.S.C. § 11347.

Respectfully submitted,

JOHN O'B. CLARKE, JR.
(Counsel of Record)

HIGHSAW & MAHONEY, P.C.
Suite 210
1050-17th Street, N.W.
Washington, D.C. 20036
(202) 296-8500

Attorneys for Respondents
United Transportation Union

Date: August 15, 1986

APPENDIX A

In the Matter of Arbitration Between

NORFOLK AND WESTERN RAILWAY COMPANY

and

ILLINOIS TERMINAL RAILROAD COMPANY

vs.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS

and

UNITED TRANSPORTATION UNION

Finance Docket 29455

OPINION AND AWARD

Background

This is an arbitration proceeding pursuant to the provisions of the *New York Dock* Labor Protective Conditions (under Article I, Section 4), imposed by the Interstate Commerce Commission in Finance Docket Number 29455.

Hearing was held at St. Louis, Missouri on November 11, 1981, at which time oral argument was heard and exhibits offered and made part of the record.

In addition to the submissions presented at the hearing, the parties agreed to file post-hearing submissions and reply submissions. The post-hearing submissions of Carriers and UTU were received on November 25, 1981. Because of an incorrect mailing address, the post-hearing submission of BLE was not received until December 2, 1981.

Carriers were represented by R. D. Kidwell, System Director Labor Relations and M. M. Lucente, Esq. The UTU was represented by Vice Presidents C. L. Caldwell and H. G. Kenyon, and W. G. Mahoney, Esq. The BLE was represented by Vice President E. E. Blakeslee.

Statement of the Case

On June 22, 1981, the Interstate Commerce Commission (ICC) authorized the acquisition of the Illinois Terminal Railroad Company (IT) by the Norfolk & Western Railway Company (N & W). The acquisition authorization was conditioned upon the N & W's agreement to accept the provisions of the *New York Dock II (New York Dock Railway-Control—Brooklyn Eastern District,* 360 I. C. C. 60 (1979).

Article I, Section 4 of the New York Dock Conditions require that subsequent to Carriers' serving a 90 day notice of the intended transaction, the parties endeavor to negotiate an implementing agreement under which the employees will work after the implementation of the consolidation.

On July 29, 1981, Carriers' served the required notice on the Brotherhood of Locomotive Engineers (BLE) and the United Transportation Union (UTU) of their intent to "unify, coordinate and/or consolidate their respective operations" on or after November 1, 1981. After serving the requisite notice, the parties met on several occasions in an effort to reach agreement under which the employees would work upon implementation of the consolidation. The parties were unable to reach agreement, and Carriers then advised the Organizations that all proposals made (except Carriers' original proposal) were withdrawn; and that Carriers were invoking arbitration pursuant to Article I, Section 4 of the New York Dock Conditions.

The pertinent portions of the July 29, 1981 Notice by Carriers read:

> "As a result of the Carriers' excercise of the above-described authority, it is intended to unify, coordinate and/or consolidate facilities used and operations and services presently performed separately by Illinois Terminal Railroad Company and Norfolk & Western Railway Company.
>
> It is intended that all train and engine service employees represented by the Brotherhood of Locomotive Engineers or the United Transportation Union will, on the effective date of the unification, coordination and/or consolidation, be integrated into an appropriate single seniority roster and that such employees will be employees of NW and will be available to perform service on a coordinated basis subject to currently applicable NW (former Wabash) agreements."

Carrier's initial Implementing Agreement dated August 31, 1981, was a proposal involving BLE only, and excluded UTU. That Agreement read in pertinent part:

> "Article I
> Section 1
>
> (a) Except as provided as in (b) below, the names and seniority dates of the active IT engineers (all who are working as engineer or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) will be dovetailed with the active NW engineers (all who are working as engineer, fireman or hostler either extra or regular or those who stand to work as such on the effective date of this Agreement) on St. Louis Terminal. Thereafter, the inactive (not working or do not stand to work as engineer, fireman or hostler) IT engineers names will be dovetailed with the inactive NW engineers on St. Louis Terminal and the combined inactive group will then be placed on the bottom of the previously dovetailed active group of engineers. This will constitute the new NW consolidated St. Louis Terminal Roster.
>
> (b) IT engineers electing not to have their names and seniority dates dovetailed into the St. Louis Terminal Roster will advise the Carrier within ten (10) days of the effective date of this Agreement of the NW's Decatur Division road or yard roster, excluding roster of Forrest District and Hannible-Quincy Yards, on which they elect to have their names and seniority dates dovetailed, and their names will be removed from said St. Louis Terminal Roster.

Article II—Schedule Agreement

Upon implementation of this Agreement, all engineers in the consolidated seniority districts will be subject to the applicable Schedule Agreement in effect on the former Wabash, except as specifically provided herein.

* * * *

Article XIV

This Agreement, while bearing the signature of the United Transportation Union General Chairman who formerly represented engineers on the former Illnois Terminal Railroad Company is hereafter recognized as an agreement between Norfolk and Western Railway Company and Brotherhood of Locomotive Engineers only."

In summary, Carriers' proposed Implementing Agreement would:

(1) Dovetail the seniority of employees on a two-tiered basis (active with active, inactive with inactive)

(2) Place the IT employees under the N & W (Wabash) schedule agreement, and

(3) Transfer the representation of the IT employees from UTU to BLE.[1]

Issues To Be Resolved

The parties are in agreement that there are two essential issues to be resolved in this dispute:

1. Does this Board have the authority under New York Dock Conditions to change the provisions of existing

[1] Carriers reject the third contention, asserting that the Board is not being asked to alter representation rights. Carriers state: "The Illinois Terminal engineers represented by UTU constitute a minority of the employees of the craft of engineers in the post-consolidation NW system. As such, UTU must apply for certification to represent engineers of the consolidated NW system, regardless of which agreements remain in effect."

collective bargaining agreement, i.e. the authority to terminate the IT—UTU agreement and remove the IT engineers from UTU's jurisdiction.

2. Is the Carriers' proposal to dovetail seniority rosters (active with active and furloughed with furloughed) a fair and equitable method of combining the N & W—IT work of locomotive engineers.

Position of the Carriers

Carriers argue that the consolidation proposal, particularly the provision for the placement of all employees under one N & W schedule agreement, is the only proposal that will effectively achieve the purpose and intent of the ICC order. Otherwise, Carriers argue, N & W will have to live indefinitely with two separate and distinct work forces—"One still operating under N & W rosters and rules and one still dependent on IT's rosters and rules even though IT and its operations have disappeared."

Carriers argue that the arbitrator's authority under Section 4 of the *New York Dock* Conditions includes the power to change the provisions of existing collective bargaining agreements. Carriers assert that the arbitrator's authority is consistent with the principal enunciated by the ICC in *Southern Railway—Control-Central of Georgia*, 331 ICC 165: "That the very purpose of the first and landmark set of merger protection conditions—the Washington Job Protection Agreement (WJPA)—was to provide a basis for 'superseding' existing agreements in order 'to avoid . . . the prohibitions against transfering work from one railroad to another contained in collective bargaining agreements . . .' While Carriers agree that the ICC in *Southern Railway-Control* that agreements were not automatically cancelled by a merger order, they argue that the ICC "prescribed Sections 4 and 5 of the Washington Job Protection Agreement as conditions of the merger in order to provide a mechanism by which agreements could be changed," and that Sections 4 and 5 (which formed the basis for Section 4 of the *New York Dock Conditions*) "required Carriers and labor organizations to negotiate over 'each plan of coordination

which results in the rearrangement of forces' "and that in the event that the parties failed to agree, both Section 5 of the Washington Job Protection Agreement and Section 4 of *New York Dock,* a 'superseding process' through arbitration."

Carriers refer to the New York Dock decision[2] (Which expressly refers to the consolidation of seniority rosters as a change that is subject to its procedures), and quotes the Commission's statement that "any future related action taken pursuant to an approval (i.e., consolidation of rosters as a result of the control) will require full and literal compliance with the conditions," and urge that "where seniority rosters and work are consolidated, it necessarily follows that rules *must* be consolidated and made uniform as well. Otherwise, the absurd situation of employees working at the *same* time on the *same* crew under a different set of work rules would result."

(Underscoring provided.)

Carriers reject the Organizations' contention that Section 2 of the *New York Dock* Conditions does not allow changes in agreement through the arbitration process. Section 2 reads:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes."

Carriers argue that the arbitration process set forth in Section 4 is an integral part of the collective bargaining process that results eventually in an agreement voluntarily negotiated between the parties or an agreement prescribed by arbitration. Even though arbitration might be required, this does not change the character of the ultimate product, namely, a collective bargaining agreement; thus meeting the requirements of Section 2 of the *New York Dock* Conditions with respect to the procedures for changing existing collective bargaining agreements. In support of their argument, Carriers rely on the

[2] *New York Dock Railway-Control-Brooklyn E.D.T.* 360 ICC 60 (1979).

Seidenberg Award involving the Yardmasters, Conrail and the Detroit Terminal Company.

Finally, Carriers argue that the consolidation of seniority rosters and the placement of the N & W and IT work forces under the N & W Wabash agreements are necessary to carry out the transaction authorized by the ICC. Without a consolidation of seniority rosters and a unification of schedule agreements, Carriers contend they could not accomplish the central features of the application approved by the ICC. Carrier states: "IT positions *will not* become NW positions and IT'S operations *will not* be fully consolidated with NW's operations. Instead, an inconsistent and obstructive aspect of IT's former operations will survive and impede the consolidation. NW will be forced to manage the physically consolidated NW-IT properties with an unconsolidated NW-IT work force."

With respect to the question of the method of consolidating the seniority rosters, Carriers contend that the dovetailing as proposed is the most fair and equitable method of putting the rosters together. Carriers assert:

> "It would tend to keep the same employees working subsequent to consolidation that are working today. Furthermore, those presently active engineers who possibly would be furloughed subsequent to consolidation through a reduction in assignments would be the first group returned to active status by atrition of senior engineers or an increase in total number of assignments."

Carriers reject the "equity proposals" as being too difficult to administer and creating confusion and ill will among the involved employees.

Position of the Organizations

Both the UTU and BLE argue that an arbitrator does not have the authority to terminate the IT-UTU Agreement and place the IT engineers under the N & W-BLE (Wabash) Agreement. The Organizations argue that the arbitrator's jurisdiction under Article I, Section 4 of the *New York Dock* Conditions is limited to determining the implementing agreement provisions having direct application to the basic employee

protections arising from the immediate transaction and to the selection and assignments of employees affected by the transaction. Unless such jurisdiction is specifically and unequivocally given, an arbitrator may not write an collective bargaining agreement for the parties.

The Organizations argue that the arbitrators authority in this case, arising from Article I, Section 4 of the *New York Dock Conditions,* is limited. Section 4 requires "each railroad contemplating a transaction which is subject to [the New York Dock] conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces" to give advance written notice thereof to the employees and their bargaining agents which notice must "contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes." Before Carriers can consummate the transaction, the parties are required to negotiate an "agreement with respect to the application of the terms and conditions of this appendix", (Appendix III to the Commission's Order in *New York Dock*) and further providing "for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case." Thus, if the parties cannot agree upon the employee protections contained in Appendix III or the basis for the selection of work forces, the dispute may be submitted to arbitration for adjustment. The limited nature of an arbitrator's authority is further confirmed by Section 2 of the *New York Dock* conditions. In Section 2, the Commission preserves and continues the application of existing collective bargaining agreements when it states:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges and benefits (including continuation of pension rights and benefits) of the railroads employees under applicable laws and/or existing collective bargaining agreements or otherwise *shall be preserved unless changed by future collective bargaining or applicable statutes.*" (Underscoring added)

When Section 4 is read in conjunction with Section 2, the Organizations argue, "the limitation on an arbitrator's authority is placed beyond serious argument."

The Organizations argue further that, in addition to the preservation of existing agreements found under the provisions of Section 2 of the *New York Dock Conditions,* Sections 2, Seventh and 6 of the Railway Labor Act prohibit the Carriers from abolishing bargaining agreements; and that a collective bargaining agreement subject to the provisions of the Railway Labor Act cannot be revised except through the procedures of a Section 6 Notice and the other mandatory provisions of the Railway Labor Act. Since the Organizations have not agreed to any changes in the working agreements of the employees they represent or to make such changes an issue in this dispute, it is contended that this arbitrator is not authorized to adopt the Carriers proposal that the UTU-represented employees be placed under the Wabash schedule agreement; rather, they contend, this arbitrator is limited to imposing an Implementing Agreement that provides the basic protections and a "fair and equitable method for the selection of forces to perform the work involved."

The Organizations further argue that neither judicial decisions, ICC decisions, nor arbitration decisions support the Carriers' argument that the Interstate Commerce Act gives the ICC the authority to supersede collective bargaining agreements and change representation of railroad employees by its approval of a railroad acquisition. The Organizations further argue that even if the ICC had such authority as claimed by Carriers, it did not exercise such authority in this case.

With respect to the question of the method of consolidating the seniority rosters, the Organizations take different positions.

The BLE is opposed to dovetailing rosters on the basis proposed by Carriers contending that such method is inequitable and would do violence to the basic concept of seniority. The BLE urges that the seniority rosters for the craft of locomotive engineers on the combined Carrier be consolidated by dovetailing the rosters for locomotive engineers on the N & W and the IT on the basis of entry into the craft of fireman

and engine service without penalizing senior employees presently furloughed by the recession. The BLE opposes the effort by Carriers to consolidate the engineers' rosters by promotion dates after seperating the engineers into so-called active and inactive categories. The Carriers' proposal, BLE contends, creates runarounds of senior engineers by junior engineers, and penalizes senior employees on furlough and those persons who may be on sick leave or in an inactive status through no choice of their own; and is further inequitable because it does not take into consideration and employee's length of service with his orginal employer, thereby failing to consider his work contribution, disregards the different hiring and promotion patterns and practices on the two Carriers, and serves to benefit the employee working for an inefficient Carrier that has not already made economies in operation as compared with efforts to economize on the other Carrier. The BLE further oppose the UTU proposal (suggesting that the N & W and IT rosters be combined on the basis of a work equity principal) asserting that the UTU proposal "suffers from much of the same criticism of the Carriers' proposal" in that it "over-looks the foundational r mise of seniority integration to first look to the employees length of service with his original employer," and to the prior seniority rights of employees to service on their former seniority district or territory. Additionally, the BLE argues, that there is little if any data upon which to adequately consider and apply an equity formula in this case. The BLE suggests that any figures obtainable are "tainted" and cannot serve as the basis for integrating seniority rosters in a fair and equitable manner. The exclusive engine hour formula proposed by UTU could benefit the IT engineers and penalize N & W engineers because they were employees of a more efficient Carrier; and that an equity formula such as that proposed by UTU fails to take into account various factors including number of employees, hours worked, earnings, mileage, car count and tons carried. Since there is little uniformity of these factors between the two Carriers, the formula suggested by the UTU must be "disregarded as impracticable and inequitable, and other considerations must be used in combining the rosters."

The UTU takes the position that its "work equity" proposal is the most equitable because it recognizes the increase in

work and job opportunities for all employees contributed to the combined operation by IT employees. Since IT employees are comparatively junior, the straight dovetailing by seniority date method would result in the IT work being performed by N & W employees. The UTU further argues that placing all presently furloughed N & W and IT employees in a separate furlough roster would eliminate all future job opportunities for those employees even though some of them may be senior to employees on the active roster.

The UTU urges that the integration of rosters be made on the basis of the existing 1972 St. Louis Terminal Agreement; and that the difficulties in working out the terms of that Agreement as allegedly experienced by the N & W could be obviated by renegotiating the terms of that Agreement. Otherwise, the UTU argues, "to sanction implementation of such a [dovetailing] plan would not only violate the provisions of the Railway Labor Act and *NYD* but could in no sense be considered the 'fair and equitable arrangement to protect the interests of the railroad employees affected' ".

Findings and Conclusions

Issue No. 1

After careful examination of the relevant statutory provisions and their legislative history, judicial and arbitral decisions, and the ICC imposed Conditions, this Arbitrator is compelled to conclude that he has no authority to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

The ICC, in its decision of June 22, 1981, stated:

> "Our approval of NW's acquisition of IT must, nonetheless be conditioned on NW's agreement to provide 'a fair arrangement at least as protective of the interests of employees who are affected by the transaction' as the labor protective provisions imposed in control proceedings prior to February 5, 1976. 49USC § 11347. In *New York Dock RY.—Control-Brooklyn Eastern Dist.* 360 ICC 60

(1979) (*New York Dock Aff'd Sub. Nom. New York Dock RY.* v. *United States,* 609 F. 2D 83 (Second Cir. 1979), we described the minimum protection to be afforded employees under that statute in the absence of a voluntarily negotiated agreement. . . ."

Article I, Section 4 of the *New York Dock* conditions (Appendix III) provides in pertinent part:

> "Each railroad contemplating a transaction which is subject to these conditions and may *cause the dismissal or displacement of any employees, or rearrangement of forces,* shall give at least ninety (90) written notice of such intended transaction . . . such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected by the intended changes. Prior to consummation the parties shall negotiate in the following manner.
>
> Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement *with respect to application of the terms and conditions of this Appendix,* and these negotiations shall commence immediately thereafter and continue for at least thrity (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, *shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this Section 4. . . .*" (Underscoring added)

Section 2 of Appendix III provides:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, priveleges and benefits (including continuation of pension rights and benefits) of the railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved *unless changed by future collective bargaining agreements or applicable statutes.*" (Underscoring added)

Title 49 USC § 11347 of the Revised Interstate Commerce Act (a recodification of Section 5 (2)(f) applicable at the time the *New York Dock* matter was pending before the ICC), provides:

> "When a rail carrier is involved in a transaction for which approval is sought under Section 11344 and 11345 or Section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interests of employees who are affected by the transaction as the terms imposed under this Section before February 5, 1976, and the terms established under Section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the affected rail carrier will not be in a worse position to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period)."

Prior to February 5, 1976, the Commission developed a series of standard employee protective conditions imposed by the ICC in approving a transaction involving one or more railroads under Section 5 (2) of the Interstate Commerce Act.[3] All of these job protection agreements were patterned after the Washington Job Protection Agreements of 1936 (WJPA.)

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[3] The principal sets of conditions imposed by the ICC under former Section 5(2)(f) in Stock Control cases were the "*New Orleans Conditions*" and the "*Southern—Central of Georgia Conditions.*"

Section 4 of the WJPA requires that employees be given 90 days' notice of a coordination, and that such notice "shall contain a full and adequate statement of the proposed changes to be effected by such conditions, including an estimate of the number of employees of each class affected by the intended changes." Section 5 of WJPA states:

> "Each plan of coordination which results in the displacement of employees or rearrangement of forces shall provide for the selection of forces from the employees of all the carriers involved on basis accepted as appropriate for application in the particular case; and any assignment of employees made necessary by a coordination shall be made on the basis of an agreement between the carriers and the organizations of the employees affected, parties hereto. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13."

The *New York Dock Conditions* are derived from the Washington Job Protection Agreement, the New Orleans Conditions, and Appendix C-1.[4] In formulating the *New York Dock* conditions, the ICC selected the most favorable of the provisions contained in these conditions. The *New York Dock* conditions included a provision not contained in the WJPA, and that was Section 2, quoted above.

Carriers argue that this Arbitrator has the authority *and the duty* to prescribe N & W's proposal, and that this Arbitrator's power is not constrained in his authority to prescribe the terms of any "rearrangement of forces." Since the Commissions authority is exclusive and plenary under the provisions of Section 11341 of the Interstate Commerce Act, the Arbitrator's authority is derived from, and is an extension of, such exclusive and plenary authority. Carriers argue that the Commission's order authorizing the purchase and consolidation of IT by N & W and requiring arbitration of disputes involving the

[4] Protective provisions promulgated by the Secretary of Labor under the Rail Passenger Service Act of 1970.

"rearrangement of forces" supersedes any other agreements or laws, including the Railway Labor Act.[5]

Central to the position of the Carriers is the question of whether the negotiation and arbitration provisions of employee protection conditions in consolidation cases provide a mechanism that supersedes Railway Labor Act requirements and permits an Arbitrator to transfer work and employees despite any such prohibitions contained in collective bargaining agreements pursuant to the Railway Labor Act.

This Arbitrator is of the opinion that the question must be answered in the negative.

An Arbitrator's authority under Article I, Section 4 of *New York Dock*, where the parties are unable to reach agreement, is limited to the determination of employee protections contained in Appendix III, and to provide a basis for the selection of work forces of the employees involved. Article I, Section 4 does not give an Arbitrator authority to alter rates of pay, rules, working conditions, or any other collectively bargained rights or benefits that are "preserved" under Section 2. It follows that an Arbitrator is not empowered, without mutual agreement of the parties, to substitute, modify or terminate agreement negotiated pursuant to the provisions of the Railway Labor Act. Carrier's contention that the arbitration process (provided in Section 4) is an integral part of the collective bargaining process, and as such, an agreement may be changed (as provided in Section 2) either by negotiation by the parties or by an arbitration award is, in this Arbitrator's view, based on the erroneous premise that the ICC mandated involuntary "interest arbitration" in contravention of the provisions of the Railway Labor Act. No persuasive authority has been presented that supports or warrants such a far-reaching result.

Contrary to the contention of Carriers, the ICC in *Southern Railway Company-Control-Central of Georgia Railway* Company (Finance Docket No. 21400, 331 ICC 151) does not, in the opinion of this Arbitrator, support the position of Carriers.

[5] Sections 2 Seventh, and 6 of the Railway Labor Act prohibit a Carrier from unilaterally abolishing or revising a bargaining agreement.

A reading of the ICC decision in *Central of Georgia* warrants the finding that the ICC, notwithstanding its plenary and exclusive jurisdiction in these matters, recognizes the need to preserve the rights of employees under their collective bargaining agreements; and that those rights may not be abrogated by arbitral fiat

At page 169, the Commission states:

> "[T]he rights of railroad employees under their collective bargaining agreements, under the Washington Agreement and under the protective conditions imposed upon the Carriers under Section 5 (2)(f) are independent, seperate, and distinct rights. *We have historically recognized the independent nature of those rights and have distinguished the employee rights derived from collective bargaining agreements from those derived from conditions which we have imposed upon carriers.* The rights under the former are based upon private contracts; those under the latter stem from our statutory duty to protect employees."

The Commission goes on to state, at page 170:

> "Of equal importance, this contention of applicants is demonstrably erroneous. By its terms, Section 5 (11) applies only to antitrust and other restraints of law from carrying 'into effect the transaction so approved***'. Neither the Washington Agreement nor the specific collective bargaining agreements between these roads and their employees is such a restraint, for indeed Section 5 transactions have been successfully consummated in full compliance with such terms.
>
> * * *
>
> *The designated 'exclusive and plenary power' of the Commission in Section 5 (11) cannot be so broadly construed as to brush aside all laws—be they statutorily created anti-trust laws or voluntary contractual agreements made binding by the force of law."* (Underscoring added)

In further support of this Arbitrator's holding that Carriers are in error when they contend that the ICC's exclusive and plenary authorization of the purchase and acquisition of IT by N & W supersedes any other agreements or the Railway Labor Act, and, by extension, that "an arbitrator has the authority, under the necessary, 'superseding' authority of Section 4 of *New York Dock*, to alter collective bargaining agreements in order to achieve an effective consolidation," Referee Bernstein in *American Railway Supervisors Association et al vs. Southern Railway System* (Docket No. 141) stated the following relative to the WJPA (from which *New York Dock* conditions are derived) and the Railway Labor Act:

> "Section 5(2)(f), enacted in 1940, directs the Interstate Commerce Commission to impose conditions for the protection of employees in merger and other cases. In intent and practice those conditions are much like those of the Washington Agreement. The labor organizations declared at the hearings on the measure that they sought to achieve similar employee protections on railroads which then did not subscribe to the Washington Agreement. Other provisions of the 1940 Act relieved the carriers of the threat of mandatory mergers hanging over their heads from earlier Transportation Acts. In the period preceding enactment in 1940 there was no recalcitrance by railroad labor organizations which arguably required any limitation upon their rules agreements and the job ownership they often were taken to imply; no one contended that the Washington Agreement was inadequate to its tasks. Nothing in the legislative history of Sections 5(2)(f) or 5(11) was presented which even remotely shows an intention by Congress, or anyone else, to abrogate the rules arrangements, including their merger-barring effect and the Washington Agreement's machinery for overcoming them. Indeed, as noted below, the legislation specifically recognizes the desirability and validity of such private arrangements.

Quite clearly Section 5 (11) operates to relieve carriers involved in a merger approved by the ICC of any requirement for State agency approval, the antitrust laws and other Federal, State or municipal law. Although the claim is made that this section reaches so far as to overcome provisions of the Railway Labor Act as applied to the Washington Agreement, the context and pattern of the section suggest otherwise. All of the references are to corporate, antitrust and State and local regulatory laws—there is no hint that labor-management relations are involved. Nothing in the legislative history was brought forward to suggest that a wholesale change in the procedures of the Railway Labor Act for modifying rules agreements—assuredly a fundamental and important change—was intended. Any such endeavor would have meant a major legislative battle on the point; but no such thing occurred. It staggers the imagination that so radical a change was in fact meant and made without anyone noticing at the time. Nor was such an effect necessary as to mergers because the Washington Agreement provided the mechanism to accomplish them.

* * *

The interplay of the Washington Agreement and the Railway Labor Act must be understood. The Agreement was designed to facilitate mergers, consolidations, and the like but on stated conditions (notice, implementing agreement, benefits to those adversely affected). The Railway Labor Act prevents either carriers or unions from making unilateral changes in those agreed provisions; the Agreement also has limits upon the termination of is applicability. Hence when a merger etc. is undertaken before the required steps to end the Agreement are taken this Agreement binds the union to permit the job combinations required by the merger and requires the carriers involved to follow its procedures and accord its benefits. The recognition given the Washington

> Agreement in the last sentence of Section 5(2)(f) indicates that Congress regarded such a private contractural arrangement as harmonious with the ICC power to imposed employee protective conditions. That provision should be read with Section 5(11). The recognition and encouragement thereby accorded the Agreement argues that it is not overridden by Section 5(2)(f) nor is the protection accorded to the Agreement by Section 6 of the Railway Labor Act vitiated."

The Arbitrator has reviewed the awards cited and relied upon by Carriers and, with all due respect for their authors, disagrees with their conclusions.

None of the awards contains any rationale or analysis that would form any justifiable basis for the result reached. These awards are not only not instructive but cannot be considered to have any precedential value. See: *Conrail & Detroit Terminal Company & RYA* (August 13, 1981); *Chesapeake & Ohio Railway & BLE/UTU* (May 12, 1980); and *New York Dock Railway & Brooklyn Eastern District Terminal & BLE* (December 15, 1980.)

The Aribtrator has also reviewed the judicial decisions cited by Carriers, and has found them to be either irrelevant or unpersuasive as to the matters involved in this dispute. None of the cases cited deals directly with the nature and extent of an Arbitrator's authority to alter or invalidate negotiated bargaining agreements under the circumstances presented.

The Arbitrator is satisfied, considering all of the circumstances, that the "work equity" proposal of the UTU is not as equitable over-all as the method proposed by BLE and agreed to by the Carriers.

* * *

Based on the foregoing, the Arbitrator renders the following:

AWARD

1. The Arbitrator is not empowered, without specific authority and mutual agreement by the parties, to substitute, modify or abrogate a collective

bargaining agreement (or any provisions thereof.) There is, therefore, no jurisdiction to terminate the IT Agreement and place IT employees under the N & W (Wabash) Agreements.

2. The parties are directed and ordered to consolidate the seniority rosters for the craft of locomotive engineers on the combined Carrier on the basis of date of entry into the craft of firemen and engine service without differentiating between active and furloughed employees; and the parties should execute any agreement necessary to carry out the direction and order of this paragraph of the Award.

NICHOLAS H. ZUMAS

Nicholas H. Zumas, Arbitrator

Date: February 1, 1982

APPENDIX B

In The Matter Of Arbitration Between:

NORFOLK AND WESTERN RAILWAY COMPANY

INTERSTATE RAILROAD COMPANY, and

SOUTHERN RAILWAY COMPANY

and

TRAINMEN AND CONDUCTORS
Represented by the United
Transportation Union

Arbitration Pursuant to Action By the National Mediation Board and Notice of the Interstate Commerce Commission in Finance Docket Number 30582 (Sub-No. 1)

Arbitration Panel:	Robert J. Ables, Neutral Referee, Washington, D. C. David N. Ray, Carrier Member, Director, Labor Relations, Southern Railway Company L. W. Swert, Employee Member, United Transportation Union, Vice President
Appearing For The Carriers:	Jeffrey S. Berlin, Esq., Washington, D. C. Russell E. Pommer, Esq., Washington, D. C. William P. Stallsmith, Jr., Esq., Norfolk, Virginia

Also Present or Testifying for The Carriers:	T. E. Gurley, General Manager, Eastern Region, N & W Robert S. Spenski, Assistant Vice President, Labor Relations, Southern E. M. Martin, Regional Director, Labor Relations, N & W J. R. Binau, Assistant Director, Labor Relations, Southern K. J. O'Brien, Assistant Director, Labor Relations, Southern M. C. Kirchner, Director, Labor Relations, Norfolk Southern
Appearing For The Union:	Clinton J. Miller, III, Esq., United Transportation Union, Assistant General Counsel, Cleveland, Ohio
Also Present or Testifying for The Union:	A. Smith, UTU General Chairman, Southern R. F. Spivey, UTU General Chairman
Proceedings:	Netural referee appointed by the National Mediation Board: June 13, 1985. Pre-hearing briefs received: August 26, 1985. Arbitration hearing: Atlanta, Georgia; August 28, 1985. Transcript received: September 3, 1985. Post-hearing briefs received: September 9, 1985.
Date of Decision:	September 25, 1985.

ARBITRATION AWARD

NORFOLK AND WESTERN RAILWAY COMPANY
INTERSTATE RAILROAD COMPANY
SOUTHERN RAILWAY COMPANY

and

TRAINMEN AND CONDUCTORS Represented By
The United Transportation Union

OPINION

I. JURISDICTION

This dispute between railroads and their employees is another round of an old fight fought on the same battlefield. Each side has had enough victories to encourage it to persist in the contest. Neither side seems to want to change either its strategy or tactics, and neutrals, like arbitrators and judges, have not seemed to be able to make a decision to put the issue to rest. The decision here is not likely to do more.

1. Issue

At issue is the right of railroad employees represented by their labor organization, the United Transportation Union (Union) in this case, to say to their employer railroad(s), the Norfolk and Western Railway Company (N & W), Interstate Railroad Company (Interstate) and Southern Railroad Company (Southern) (Carrier or Carriers), after consolidation authorized by the Interstate Commerce Commission (ICC or Commission), with labor protective conditions that, if pay, rules, working conditions, etc., in an existing collective bargaining agreement would be changed as a result of changes made by the Carrier authorized by the consolidation, such pay, rules, working conditions, etc., can be changed only by further collective bargaining under the provisions of the Railway Labor Act (RLA), and not under the arbitration provisions of the

labor protective conditions specified by the ICC in the event the parties are not able to make an agreement to implement the consolidation.

There is respectable judicial and arbitral authority to support the Union's position that the RLA controls.

There is respectable judicial and arbitral authority to support the Carriers' position that the arbitration provisions control.

2. ICC Conditions

The dispute on this point seems to flow not from any challenge of the right of the ICC to specify labor protective conditions upon authorizing a railroad consolidation (or exempting it from regulation), but from the kind of such conditions specified.

Despite a record of proceedings approaching those in hotly contested cases appealed to a U. S. Court of Appeals,[1] it is not clear why the ICC persists in specifying labor protective conditions that perpetuate the problem.

a. Section 2 Conditions

On the one hand, the Commission regularly specifies the following condition in labor protective conditions:

> The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of railroads' employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

[1] Including pre-hearing briefs, transcript, post-hearing briefs, countless references to court and arbitrators' decisions and many other exhibits.

Typically, the ICC specifies this condition in Article 1, Section 2 (Section 2) of its protective conditions, like the *Mendocino Coast* conditions applicable here.[2]

The clear implication of this condition is that the essence of an existing collective bargaining agreement (pay, rules, working conditions, pension rights, etc.), if not the agreement itself, continues after consolidation ("shall be preserved") unless changed by "future collective bargaining agreements". This latter phrase has two important implications: any new agreement must be different from the existing agreement and it has to be bargained for—which by definition means agreement or resort to authorized statutory actions to break the deadlock.

Thus, Section 2 applicable here in the Mendocino conditions provides substantial leverage for the Union arguing that certain changes desired by the Carriers under its ICC authorization (exemption) cannot be made unless both parties agree to the changes.[3]

[2] Labor (or employee) protective conditions now authorized in the Interstate Commerce Act, resulting from railroad merger, consolidation, acquisition (including trackage rights), etc. ("consolidations"), date back, at least, to The Washington Job Protection Agreement of 1936. In the present dispute, the ICC adopted the "Mendocino" conditions (*Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 354 ICC 732 (1978), *modified*, 360 ICC 653, (1980), aff'd, *sub nom. Railway Executives' Ass'n. v. United States*, 675 F.2nd 1248 (D. C. Cir. 1982), and *Norfolk and Western Ry.—Trackage Rights—Burlington Northern, Inc.*, 354 ICC 605 (1978), *modified sub nom. Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 ICC 653 (1980), aff'd. *sub nom. Railway Labor Executives' Ass'n v. United States*, 675 F.2nd 1248 (D. C. Cir. (1982)). "New York Dock" conditions are also specified by the ICC for similar authorized changes. They are virtually the same as the Mendocino conditions. There have been—and there presently are—a number of differently named conditions all having the same purpose of specifying protection of railroad employees adversely affected by consolidations. The kind or adequacy of labor protective conditions in the present dispute are not in issue.

[3] The parties have agreed on all provisions except one. The 27 trainmen on the Interstate Railroad who are being consolidated into the N & W and Southern coal rail operations at coal sources in Southwest Virginia object to working under the N & W schedule of agreements (collective bargaining agreement or contract) and prefer to continue working under their own contract. In the alternative, the Interstate employees are willing to work

(footnote continues)

b. Section 4 Conditions

As the Union draws comfort in this dispute from Section 2, the Carriers emphasize that Article 1, Section 4 (Section 4), of the Mendocino conditions controls.

This section provides in pertinent part that where the Carriers contemplate an authorized transaction which

> will result in a dismissal or displacement of employees or rearrangement of forces

negotiations for the purpose of reaching an implementing agreement are required. If, at the end of a 20-day period the parties fail to agree, negotiations are to terminate and either party to the dispute may submit the dispute for adjustment, in accordance with designated procedures, including designation of a neutral referee whose decision "shall be final, binding, and conclusive".[4]

The clear implication of this Section 4 condition is that a "transaction", such as here contemplated, of at least rearranging forces,[5] was envisaged by the ICC when it granted the

(footnote continued)

under the Southern contract. According to the Interstate employees, working under the N & W contract would—or probably would—require a change in home base with associated problems of moving families from Andover, Virginia to Norton, Virginia, about a 45-minute drive in these mountainous, narrow, coal traffic roads. That this is a relatively small railroad has no bearing on the intensity with which each party has argued its case. The issue being the same as in much larger consolidations, each side has brought out its heavy legal artillary to argue the case.

[4] The Carriers, here, invoked this authority by petition to the National Mediation Board. The Union opposed the petition. Such Board appointed this arbitrator to help resolve the dispute. At the arbitration hearing, the Union agreed with the Carriers to proceeds on the basis of a Tri-Partite Arbitration Panel but held to its position that this panel had no authority to decide the question of applicability of contract.

[5] The Carriers contemplate consolidating Interstate employees into the N & W Pocahontas Division. Although Interstate employees will have certain priority rights to work they performed before the consolidation and certain "equity" when the work is performed by N & W employees, seniority rosters will be integrated and assignments can vary off the property before the consolidation.

Carriers the authority (exemption) to consolidate and it anticipated inability of the parties to negotiate an agreement to implement such transaction or changes from past operations[6] by prescribing an arbitration procedure to resolve the dispute.

Under the logic of this condition, it is almost inconceivable the Commission would not have known that pay, *rules*, working conditions, etc., under an existing contract, would not be affected by the transaction. Thus, the Commission intended to give priority to its statutory base for authorizing the consolidation with protective conditions, namely, the Interstate Commerce Act, over anything in conflict under the Railway Labor Act.

c. Section 2 and Section 4 Impasse Not Resolved by ICC

Such long-time apparent, sharp inconsistency existing in its labor protective condition between Section 2 and Section 4, it would seem the Commission would have cleared up the matter one way or the other. It has not.

Whether the Commission is skittish about taking a firm position on a question which involves administration of a statute (RLA), over which it has no responsibility, may only be speculated. It may even be that the Commission has been inattentive to the discrepancy.[7]

[6] Considering, among other things, that the purpose of the request to consolidate was to take advantage of the best grades of the respective railroads and to otherwise make the operation less costly and more efficient.

[7] A summary of the development of labor protective conditions by arbitrator Zumas—drawing on analyses by other arbitrators—is a basis for this speculation. In *The Matter of Arbitration Between Norfolk and Western Railway Company and Illinois Terminal Railroad Company v. Brotherhood of Locomotive Engineers and United Transportation Union*, decided February 1, 1982. Also, see, decision by arbitrator Seidenberg in *The Matter of Arbitration Between Baltimore and Ohio R.R. Company, Newburgh and South Shore R.W.Y. Coal and Brotherhood of Maintenance of Way Employees and United Steel Workers of America*, decided August 31, 1983.

In the Seidenberg award, the arbitrator reports that Section 2 of the New York Dock Conditions was newly added to the varied set of such conditions

(footnote continues)

The Commission may even have decided to defer to the courts the question of the applicability of the RLA, upon consolidation, in view of the substantial litigation and conflicting decisions on this and related points.

Whatever the reason the Commission has not reconciled Sections 2 and 4, the question has come around again in this proceeding: Does this arbitration panel have jurisdiction to consider the content of an implementing agreement where an existing contract would be changed and, if so, what shall be the contents of that implementing agreement?

3. Arguments

The Carriers are the moving party. They argue that:

(a) It would be inappropriate for the arbitration panel to decide the jurisdictional question because Section 4 provides required authority to fashion an implementing agreement without need to regard the "extrinsic" question on jurisdiction, leaving the disappointed party to take appropriate appeal to court.

(b) In the event the arbitration panel considers the jurisdiction question posed by the UTU, the Union's argument is defective because a tentative implementing agreement was reached by the parties on April 17, 1985, in bargaining under applicable Mendocino conditions, not under the RLA, which is not required. Also, the Carriers argue that a recent decision by the Court of Appeals for the District of Columbia Circuit, on which the Union heavily relies, actually supports the Carriers' position because, implicit in the remand of the case of the ICC to make certain findings of "necessity", was the conclusion that the Commission had the authority to decide as it had, but that

(footnote continued)

developed by the Commission since the Washington Job Protection Agreement of 1936. The New York Dock Conditions were prescribed by the Secretary of Labor (not the ICC) for those agreements whereby carriers discontinue their inter-city rail passenger service which was assumed by AMTRAK. The dissimilarity is apparent between such change in railroad operations and the instant case involving like operations in the same area and affecting only 27 employees.

it had not satisfied certain preconditions. The Carriers urge reliance on an earlier decision in the Eighth Circuit Court of Appeals which is said to be more on point on the jurisdiction question.

(c) The Carriers were not precluded from going forward with preferred changes under Section 4 of Mendocino because of the Commission's finding on April 3, 1985 in the underlying case in this proceeding that "[n]o evidence has been presented to demonstrate that involved railroads intend to abrogate the contractual or statutory rights of employees". According to the Carriers, all this finding suggests is that allegations of a conflict between employees' RLA rights and a carriers' plans to effectuate an ICC authorized transaction are not to be resolved in an administrative proceeding in which the ICC passes upon the applicability or inapplicability of a blanket Section 10505 exemption.

The Union argues that:

(a) Section 2 of Mendocino precludes this arbitration panel deciding that Interstate railroad employees must operate under the N & W contract, relying in this conclusion on a series of supporting awards by arbitrators and that contrary awards by arbitrators have been eviscerated by the recent decision of the Court of Appeals for the District of Columbia Circuit.

(b) In any event, the ICC notice of April 3, 1985, concerning the absence of Carrier information on intention to abrogate contractual or statutory rights of employees shows that the Commission did not intend that there be an exemption from the requirements of the Railway Labor Act with respect to changes of pay, rules and working conditions.

4. Arbitration and Court Decisions

Arbitrators' decisions have not been dispositive of the Section 2, Section 4 impasse.[8]

[8] The parties cited a number of arbitration awards on point. The majority of awards cited favor the Union's position—but not overwhelmingly. The arbitration decisions reported are typical of the findings.

Decisions by experienced and respectable arbitrators Zumas and Seidenberg, *supra,* do not settle the matter. Each arbitrator decided against jurisdiction based on Section 2 but proceeded to require changes such as merging seniority rosters as part of an implementing agreement. Seniority rights being arguably the most important contract right for an employee, it is difficult to see a basis for deciding a Section 4 question in view of the arbitrator's decision on Section 2.

A more recent decision by arbitrator (judge) Brown on which the Carriers rely also cannot be accepted as new reasoning on the Section 2, Section 4 controversy. That arbitrator accepted jurisdiction on the strength of Section 4, adopting the argument that the ICC had plenary and exclusive authority in the field. *In The Matter of Arbitration Between Union Pacific Railroad Company and United Transportation Union,* decided January 1985. The difficulty with that decision is that, subsequently, the Court of Appeals for the District of Columbia Circuit, with respect to the same underlying consolidation, decided, in a split panel, that the Commission had completely failed to justify the necessity for waiving the Railway Labor Act respecting crew selection, following certain trackage rights granted to other railroads affected by such consolidation, and the court remanded the dispute to the Commission to consider whether it was necessary to waive the RLA to effectuate the transactions at issue in that consolidation. *Brotherhood of Locomotive Engineers v. ICC,* 761 F.2d 714 (D.C. Cir. 1985), *modified*—F.2d—(July 12, 1985), referred to hereinafter as "BLE".[9]

[9] The Carriers here urge adopting the decision of the Court of Appeals in the case of *Brotherhood of Locomotive Engineers v. Chicago and North Western Railway Company,* 314 F.2d 424 (8th Cir.) *Cert. denied* 375 US 819 (1963). In that case, the action was by the railroad against the union for a judgment declaring rights of the parties with respect to procedures to be followed in adjusting seniority rights of employees affected by consolidation of railroad yards. The Court of Appeals affirmed the District Court (202 F.Supp.277) that statutory authority conferred upon the Interstate Commerce Commission to approve and facilitate merger of carriers includes power to authorize changes in working conditions necessary to effectuate such mergers and the Commission acted within its jurisdiction in providing for adjustment

(footnote continues)

As modified, the Court vacated the Commission's 1983 orders and remanded the case to the Commission. Supporting such decision, the Court said:

> The Commission is not empowered to rely mechanically on its approval of the underlying transaction as justification for the denial of a statutory right. On remand, to exercise its exemption authority, the Commission must explain why termination of the asserted right to participate in crew selection is necessary to effectuate the pro-competitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction. Until such a finding of necessity is made, the provisions of the Railway Labor Act and the Interstate Commerce Act remain in force.

5. Arbitration Panel Has Jurisdiction To Order Implementing Agreement

Whatever arguments remain on the merits of the split decision in the BLE case, it can no longer be argued sensibly that, simply because the ICC has authority to impose protective conditions in railroad consolidations, RLA rights may be disregarded. But that is not to argue that the BLE decision puts the RLA back in the stream of things in consolidations of the kind in issue. The majority of the BLE court—with a vary strong dissent—remanded the case *to the ICC* to make findings it had not previously made with respect to RLA rights. The majority decision, therefore—as well as the minority decision—may be taken for the conclusion that the ICC can take all necessary action to authorize a consolidation, including labor

(footnote continued)

of labor disputes arising out of the approved merger. The Court of Appeals noted that, under the Railway Labor Act in a major dispute, employees cannot be compelled to accept or arbitrate as to new working rules or conditions, 45 U.S.C.A. § 151 *et seq.*, but that, as a result of the authorized merger in that case, the railroads and unions were relieved from requirements of the RLA by the Commission's authority under the Interstate Commerce Act concerning merger of carriers. Interstate Commerce Act § 5(2)(b), (c)(4).

protective conditions and procedures to resolve disputes on implementing agreements, including arbitration without deference to RLA collective bargaining rights. The only imperative is that the ICC make required findings, not that it is not authorized to make them.

As it can be accepted that the ICC has authority, i.e., jurisdiction, to effectively make a package deal on consolidations, labor protective conditions and procedures to resolve disputes on implementing agreements—based on both the Eighth Circuit and D. C. Circuit opinions—there is no logical reason not to accept that an arbitration panel, authorized under the ICC consolidation action, would not have jurisdiction to order changes to meet the purposes and objectives of the consolidation.

On such reasoning, this panel has jurisdiction to take Section 4 action in this case.

Such conclusion does not close the door in favor of the Carriers.

The Union argues, with some persuasion, that, by not presenting their RLA arguments to the Commission, the Carriers did not argue their case at the time and place to have accomplished their objectives.

It is most troublesome that, at the time the Railway Labor Executives' Association (RLEA), on behalf of employees in this dispute, argued RLA rights to the ICC, the Commission not only commented that "[n]o evidence has been presented to demonstrate that the involved railroads intend to abrogate the contractual or statutory rights of employee" (ICC Notice, Finance Docket No. 30582 (Sub No. 1), April 3, 1985), but added in the same notice that, although exemptions under 49 U.S.C. 10505, do not operate to relieve carriers of applicable laws and agreements relative to labor relations

> This proceeding is not the appropriate forum to resolve the issue of whether applicable laws and labor agreements require the railroads to obtain the consent of employees before making employment changes under either the exempted contract to operate or the trackage rights.

If the Commission meant that the appropriate forum was an arbitration panel, as here, the Commission was ducking its clear responsibility to complete the package to satisfy its statutory responsibilities.

If the Commission meant that the appropriate forum was the courts, it was ducking the same responsibilities.

If the Commission meant to leave the parties to their RLA rights, it was ducking the same responsibilities.

Actually, it seems that the Commission was just ducking.

There is no need or reason for this arbitration panel to duck.

The ICC had jurisdiction to complete the action; thus, the panel has jurisdiction to complete the action.

An implementing agreement will be ordered.

II. IMPLEMENTING AGREEMENT

No responsible court would ultimately refuse to order an implementing agreement under the disputes settling provisions of Section 4. Only the 27 trainmen off the Interstate Railroad who did not ratify the tentative agreement of April 17, 1985, are holding out on working under the N & W contract. All the other unions in this case have accepted the same or similar agreement, including organizations representing firemen, engineers, clerks and maintenance of way employees.

Labor protective conditions are in place.

There is no legal, public policy, or common sense reason not to decide at this level of proceedings what will eventually be decided, i.e., an implementing agreement to accomplish the purposes of an authorized consolidation.

The proposed joint operation of the Interstate Railroad properties, which are located in the coal fields of Southwestern Virginia, following a consolidation in 1982 of N & W, Southern and their respective subsidiaries, including Interstate, under the control of Norfolk Southern Corporation, is intended to take

advantage of better grades and operating routes for traffic moving from Interstate origins to points on the N & W and Southern and to achieve certain economies and efficiencies in interstate operations.

Among changes proposed by the Carriers to realize the advantages of such joint operation are consolidating the seniority rosters of Interstate train and engine service employees with those of N & W Pocahontas Division train and engine service employees. At present, Interstate crews do not work on N & W lines or vice versa. Upon consolidation, Interstate crews will operate off the Interstate territory. They would work shifters in the area that can work both Interstate and N & W mines.

According to T. E. Gurley, General Manager, Eastern Region, N & W Railroad, who testified at the arbitration hearing, in future operations, it is not contemplated that Interstate crews will be operated separately from the crews of the N & W. Rather, it is contemplated that the crews will be combined on shifters in the Norton and Andover, Virginia area, based on their seniority on both N & W and Interstate. If the Interstate trainmen did not operate under the N & W contract but, rather, operated under their present Interstate contract, important contract problems would develop, including observance of the Hours of Service law; different reporting locations for crews operating the same territory; differences of total hours worked each week (referred to as "gouging"); differences on opportunities to bid for and displace a junior employee on a job preferred by a senior employee; and different operation of extra boards. If, however, the N & W contract were applicable (for the 27 Interstate trainmen and the existing 816 N & W trainmen), employees, including present Interstate employees, would be able to draw assignments throughout the territory (which is considerably larger than the territory presently operated by Interstate contracts, such as deadheading, filling vacancies, meal times, selection of vacation times and arbitraries, which would creat friction as between N & W and Interstate crews working the same territory if the employees worked under different contracts, would be eliminated. Also, Interstate employees would enjoy the higher basic rate of pay presently applicable in the N & W contract.

According to A. Smith, General Chairman for the trainmen and conductors on both the Interstate and Southern railroads, the Union offered to work under the Southern agreement, which would accomplish exactly what the Carriers intend under the proposed implementing agreement, including the N & W contract. According to this official, there would not be, for instance, a provision for gouging or a provision that a senior brakeman could displace a junior brakeman. There would be a deadhead rule and extra boards would not be different. And there would be no difference in meal allowances or in bidding for vacant positions. Moreover, the Interstate employees would get a raise under either the Southern or N & W agreement.

Further, to the question asked by counsel for the Union: "With the Southern Agreement being applicable, could the employees of the Interstate be required to report to Norton?" The answer was "Yes, sir." (Transcript, page 100).

On close questioning why the trainmen on the Interstate resisted accepting the tentative implementing agreement reached by the parties on April 17, 1985, the Union representative testified that the Interstate employees had worked previously with the Southern agreement and were more comfortable with it, but that their major concern was the possibility of having to move from their home area in Andover, Virginia to another point on the consolidated operation, with all of the adverse implications for families involved in such move.

In negotiations leading to the tentative implementing agreement, upon the insistence of Union negotiators, a seniority provision was agreed to in order to keep a fair balance between bidding rights of the relatively small number of trainmen off the Interstate as compared to those rights of about 816 trainmen off the N & W.

If, as the Union now accepts, Interstate trainmen might be required to move their home base under the Southern contract (which is acceptable to the union), and there is no substantial reason not to accept the N & W contract on the other differences between the two contracts, there is no reasonable basis to reject the tentative implementing agreement of April 17, 1985. Recognizing, again, that labor protective conditions

are in place and that, on its face, provisions in the N & W contract may actually be favorable to the Interstate employees, the tentative implementing agreement of April 17, 1985 is fair, equitable and reasonable and will effectuate the purposes and objectives of the transaction exempted by the Interstate Commerce Commission when it authorized the consolidation underlying the proposed joint operation of Interstate properties.

AWARD

1. This arbitration panel has jurisdiction to consider an implementing agreement under Article I, Section 4 of the *Mendocino Coast* labor protective conditions.

2. The Carriers are authorized to put into effect the tentative implementing agreement of the parties, dated April 17, 1985.

ROBERT J. ABLES

Robert J. Ables
Neutral Referee

Dated: September 25, 1985

DAVID N. RAY

David N. Ray
Carrier Member

Dated: September 27, 1985

L. W. SWERT
Dissenting Opinion Attached

L. W. Swert
Employee Member

Dated: October 10, 1985

Dissent of Employee Member to Award in Finance Docket 30582 (Sub. No. 1)

I cannot agree with the Award in this matter not only because it is contrary to the great weight of arbitral precedent and legal authority in my view, but also because of its cavalier treatment of the facts.

It assumes the April 17, 1985 document was a "tentative implementing agreement" throughout its analysis when the

record shows the matter of contract applicability was never settled. The Union parties merely agreed to submit the document to the membership as the carriers' last offer. Although the Award notes in footnote at page 5 that the parties agreed to all provisions of an implementing agreement "except one" (contract applicability), it treats the April 17, 1985 document *in toto* as an agreement in the remainder of its analysis.

More importantly, the Award purports to resolve collective bargaining issues that the carrier witness frankly admitted were not raised between the parties concerning the differences in the contracts at issue. Nothing could more clearly indicate this Board's usurpation of authority delegated by the Congress to the parties under the Railway Labor Act.

Finally, the Award's language itself indicates the the Board has acted far beyond the scope of its jurisdiction. The Board notes at page 7 that the ICC has not resolved over the years what the Board perceives as the inconsistency between Article I, Section 2 and Article I Section 4. Moreover, it is beyond cavil that unless the ICC justifies in its order that the Railway Labor Act be negated in a specific transaction, the requirements of that act regarding changes in contracts stand. This was noted by the Board in its citation to *BLE* v. *ICC*, 761 F.2d 714 (D.C. Cir. 1985) at pages 12 and 13. The Board then blithely ignored the ICC's specific order concerning Railway Labor Act rights cited at page 15, and after finding the ICC "ducked" the issue, decided it nonetheless had authority to change the contract on the property. This Board has no more authority than the ICC; and where the ICC has "ducked" this issue specifically, this Board may not resurrect it without acting outside the scope of its jurisdiction. *BLE* v. *ICC, supra.*

L. W. Swert

L. W. Swert, Vice President
United Transportation Union
Employee Member

(10) (11)

Nos. 85-792 and 85-793

In the Supreme Court of the United States

OCTOBER TERM, 1986

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

MISSOURI–KANSAS–TEXAS RAILROAD COMPANY, PETITIONER

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission
Washington, D.C. 20423
(202) 275-1851

15 MP

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BROTHERHOOD OF LOCOMOTIVE ENGINEERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

In our opening brief, we urged that the Interstate Commerce Commission's approval of trackage rights granted to the Missouri-Kansas-Texas (MKT) and Denver & Rio Grande Western (DRGW) railroad companies, in connection with the Commission's approval of a major rail consolidation,[1] exempts those carriers from provisions of the Railway Labor Act (RLA), 45 U.S.C. 151 *et seq.*, that would pose obstacles to the implementation of the approved transactions. We demonstrated that the plain language of the Interstate Commerce Act's (ICA's) statutory exemption provision, 49 U.S.C. 11341(a), sup-

[1] See *Union Pacific Corp., Pacific Rail System, Inc. & Union Pacific R.R.—Control—Missouri Pacific Corp. & Missouri Pacific R.R.*, 366 I.C.C. 462 (1982).

ports the Commission's interpretation (Gov't Br. 23-28). We also demonstrated that the Commission's interpretation is consistent with the structure and purposes of the ICA's consolidation provisions (*id.* at 28-35) and with six decades of agency and court interpretation of the statute (*id.* at 36-42). We explained that the contrary view taken by the court of appeals reflects a serious misunderstanding of the role of the Commission in approving carrier-negotiated transactions (*id.* at 32-34) and would seriously impede the implementation of Commission-approved transactions (*id.* at 42-47). Respondent unions, Brotherhood of Locomotive Engineers (BLE) and United Transportation Union (UTU), have largely failed to answer our arguments. Instead, they devote much of their energy to issues raised in their pending cross-petitions, obscuring the central issue in this case.

1. The issue in this case is the meaning of Section 11341(a), which exempts a party to a Commission-approved transaction from "all other law * * * as necessary to let that person carry out the transaction." We submit that once the Commission (and the reviewing courts) approve a transaction as consistent with the ICA's congressionally specified public interest standards,[2] Section 11341(a), by its own force, exempts the party implementing the transaction from other laws that conflict with the terms of the transaction. The unions, on the other hand, maintain that the Commission, rather than Section 11341(a), provides the exemption (UTU Br. 16) and that the Commission, even after it has approved a transaction as consistent with the public interest, must "examine the means proposed by the carrier to ascertain whether that is the only method by which the transaction can be accomplished" (*id.* at 26).

[2] Section 11344(b)(1) of the ICA requires that the Commission consider various "public interest" factors, including the transaction's effect on competition and the interests of carrier employees (49 U.S.C. 11344(b)(1)).

a. The unions offer little response to the Commission's submission that the plain language of Section 11341(a) demonstrates that the provision is self-executing (Gov't Br. 23-28). They cite plain language principles (UTU Br. 18-19; BLE Br. 23) but fail to point to any language in Section 11341(a) that requires the Commission to conduct the necessity analysis that they envision. BLE opaquely observes that "[t]he exemption contained in section 11341 is not as broad as asserted by the [Commission] but only extends by its terms to those exclusions 'necessary to let that person carry out the [approved or exempted] transaction' " (Br. 37, quoting 49 U.S.C. 11341(a)). UTU states that the Commission's interpretation "effectively writes the necessity component out of the law" (Br. 20). The Commission's interpretation, however, is faithful to, and indeed mandated by, the statutory language.

Section 11341(a) does *not* state—as the unions would have it—that the Commission may exempt participants from other laws to the extent that the Commission determines that the particular transaction terms are "necessary" to the overall success of the transaction. Instead, the statute provides, in self-executing form, that a participant in an approved transaction "*is exempt*" from "other law * * * as necessary to let that person carry out the transaction" (49 U.S.C. 11341(a) (emphasis added)). The question is not whether particular transaction terms are, in the Commission's articulated judgment, "necessary." The question is whether, given the transaction negotiated by the parties and approved by the Commission, an *exemption* from other laws is "necessary" to allow the transaction to be implemented in accordance with its terms. If so, then *the statute* confers the necessary exemption. The Commission's adherence to Section 11341(a)'s unambiguous language does not "write[] the necessity component out of the law." Instead, it recognizes that Section 11341(a) defines the scope of the exemption by the terms of the approved transaction.

b. The unions offer no response to our submission (Gov't Br. 20, 28-35) that the Commission's interpretation is consistent with two central purposes of the ICA's consolidation provisions: first, to leave to the carriers themselves the task of formulating transactions; and second, to expedite transactions that are in the public interest by replacing the complex web of potentially applicable federal, state, and local law with a single Commission proceeding, involving all interested parties, where the proposal can be evaluated in its entirety under congressionally specified criteria. The unions, limiting their focus to the question of labor relations, seemingly overlook the fact that Congress has instructed the Commission to implement a national transportation policy that, in turn, requires consideration of competition and economic efficiency issues as well as labor protection. See 49 U.S.C. 10101a(2).

c. The unions' principal argument on this point is that the Commission's interpretation of Section 11341(a) is inconsistent with a Fifth Circuit decision, *City of Palestine* v. *United States*, 559 F.2d 408 (1977), cert. denied, 435 U.S. 950 (1978). See UTU Br. 26-29; BLE Br. 38-39. However, that case has little relevance here. As we explained in our opening brief (at 41 n.26), *City of Palestine* held that the Commission exceeded the scope of its transaction approval authority when it purported to void a contract that was "not germane" to the merger transaction (559 F.2d at 414).[3] But the court expressly recog-

[3] In that case, the Commission granted a merging railroad's request that it be relieved of a burdensome agreement with the City of Palestine, requiring that a certain percentage of the railroad's operations take place in that city. The court reversed the Commission, explaining (559 F.2d at 414):

> The Palestine Agreement has no role in the [Commission's] analysis of the proposed voluntary merger * * *. Despite the irrelevance of the Palestine Agreement to the merger, the [Commission] has gratuitously relieved [the railroad] of its contractual obligations. We cannot countenance that action.

Thus, that case turned on the fact that the contractual obligation was irrelevant to the transaction at issue.

We note that the Commission here, through its labor protective provisions, has required each railroad to protect the collectively bargained rights of its employees who are affected by the transaction. Contrary to UTU's suggestion (UTU Br. 10), the Missouri Pacific Railroad Company (MP) has never denied its obligation to negotiate an implementing agreement with its employees governing any required rearrangement of MP forces resulting from MKT's and DRGW's trackage rights operations. And, as UTU acknowledges (*id.* at 11 n.9), MKT has negotiated new collective bargaining agreements with its employees governing its trackage rights operations. See MKT Br. 7-9.

nized that it was dealing with the scope of the Commission's transaction approval authority, not with the meaning of Section 11341(a) as applied to terms that are plainly part of what the Commission is authorized to approve. See 559 F.2d at 414. Two other factors further distinguish the present case from *City of Palestine*. First, the unions here failed to raise any "germaneness" objection to the challenged transaction terms during the Commission's approval proceedings.[4] Second, there is no serious dispute

[4] Interested parties are generally expected to challenge the germaneness of transaction terms during the Commission's transaction approval process. That is exactly what the City of Palestine did (see 559 F.2d at 412) and what the unions failed to do here. The unions participated in the Commission's consolidation proceedings, were fully aware that MKT and DRGW had requested trackage rights reserving the rights to use their own crews, but failed to object to the railroads' crewing terms (Gov't Br. 7-9, 43-45; MKT Br. 3-7). The unions never suggested that Commission approval of MKT's and DRGW's proposals would conflict with employee rights under the RLA or under existing collective bargaining agreements (see Pet. App. 58a-62a).

The unions contend that their failure to raise timely objections is excusable because they thought that the Commission's labor protective provisions would negate crewing terms of the proposed trackage rights agreements (UTU Br. 21-22; BLE Br. 27 n.13). That contention

that the crewing provisions at issue *are* germane terms of the trackage rights transactions.[5]

City of Palestine simply does not reach the central issue here: whether Section 11341(a) is self-executing. Contrary to the unions' contentions, the Commission's interpretation of Section 11341(a) is fully consistent with judicial and agency precedent. As we noted in our opening brief (at 36-39), the Eighth Circuit has expressly recognized that Section 11341(a) is self-executing. *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.*, 314 F.2d 424, 432, cert. denied, 375 U.S. 819 (1963). The First Circuit recently acknowledged the "self-executing nature of § 11341(a)" as well. *Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.*, 788 F.2d 794, 801 (1986), cert. denied, No. 85-2153 (Oct. 6, 1986). And the Commission has consistently adhered to that position for nearly 30 years. See Pet. App. 67a; *Railway Express*

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strains credulity. The Commission has *never* interpreted its labor protective provisions as negating the right of a railroad, granted trackage rights in a consolidation, to crew its own trains. The railroads' specific reservation of crewing rights in their proposed trackage rights agreements certainly should have put the unions on notice of the need to challenge that provision or run the risk that their objections would be time-barred. See, *e.g.*, *Eagle-Picher Industries* v. *EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985).

[5] The Commission required MP to give MKT and DRGW trackage rights over MP lines for the specific purpose of ensuring that those railroads could remain in competition with MP. If, as the unions now urge, the MP employees were to control the crewing decisions of the tenant railroads, the effectiveness of those trackage rights could be jeopardized. As Judge MacKinnon explained, "the Commission's goal of preservation of competition through the grant of trackage rights might well be frustrated by the prospect of requiring the railroads granted those rights to negotiate with the union representing the employees of [their] *competitors*" (Pet. App. 39a (emphasis in original)). The majority did not conclude otherwise. See Pet. App. 45a.

Agency, Inc., Notes, 348 I.C.C. 157, 215 (1975); *Revised Regulations Governing Interlocking Officers*, 336 I.C.C. 679, 681 (1970); *Texas Turnpike Authority Abandonment By St. Louis S.W. Ry.*, 328 I.C.C. 42, 46 (1965); *Chicago, St. P., M. & O. Ry. Lease*, 295 I.C.C. 696, 702 (1958). The Commission's longstanding and judicially affirmed interpretation should be respected. See, *e.g.*, *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. 622, 634 (1984).

d. The unions fail to address the practical consequences of their interpretation of Section 11341(a). As we explained in our opening brief (at 32-34, 42-46), the unions would require that the Commission determine which of the terms of a privately negotiated transaction are "necessary" terms and then require that the Commission, rather than the interested parties, anticipate and identify potential legal obstacles to carrying out those terms. The unions would then permit interested parties to thwart Commission-approved transactions by raising post-approval legal challenges to transactions that have been reviewed and found consistent with the public interest. In the present case, the unions' protracted litigation has imposed considerable burdens on the implementation of a trackage rights transaction that the Commission not only approved but required as a condition to a major rail consolidation. The record in this case demonstrates how the unions' position would impede effectuation of the Nation's rail transportation policy.

2. The unions devote much of their argument to the broad questions presented in their pending cross-petitions (85-983 Pet.; 85-997 Pet.) rather than to the specific and quite different question presented by the petitions for certiorari. They maintain, in essence, that they have a contractual agreement with the Missouri Pacific Railroad Company (MP) entitling them to bargain over crewing of

MKT and DRGW trains and that the Commission lacked power to take away their rights under the agreement with MP (BLE Br. 28-34, 43-47; UTU Br. 31-50). Those contentions are not responsive to the question presented in the petitions and are, in any event, mistaken.

a. The unions asserted in the proceedings below that they have an established right, as representatives of MP employees, to negotiate with MKT and DRGW concerning the crewing of the MKT and DRGW trackage rights operations, and that those operations could not be commenced until a new collective bargaining agreement had been negotiated in accordance with the RLA. They specifically contended that (1) the issue of what crews would operate MKT and DRGW trains operating over MP tracks must be settled through the RLA's major dispute provisions; and (2) the ICA's labor protective provisions, 49 U.S.C. (Supp. II) 11347, and the labor protective conditions imposed by the Commission thereunder prohibited MKT and DRGW from unilaterally deciding to use their own crews.

The Commission rejected those contentions (Pet. App. 58a-60a, 65a). The court of appeals, however, did not address them; instead, it instructed the Commission to "explain why termination of the asserted right to participate in crew selection is necessary to effectuate the procompetitive purpose of the grant of trackage rights or some other purpose sufficiently related to the transaction" (Pet. App. 45a). The court, by characterizing the unions' purported right to "cross-bargain" with a competing railroad as an "asserted right" (*ibid.*), plainly declined to determine whether the right even exists. And the court, by requiring a remand to the Commission, intimated—but did not expressly decide—that the Commission does have power to approve transactions that specify crewing arrangements. In sum, the only question squarely decided by the court of appeals is the question presented in the petitions for certiorari, *i.e.*, whether the Commission's action was sufficient to exempt the crewing terms from any collective bargaining process required by the RLA, not the question presented in the unions' cross petitions, whether the unions had an established right to cross bargain that could not be eliminated by *any* Commission action. If the Court wishes, however, to address the unions' arguments, we would take issue with their position.

b. First, on the record in this case, the unions' purported cross-carrier bargaining rights simply do not exist. The Commission found the unions' claim to those rights "unpersuasive and unsupported by the record" (Pet. App. 58a-59a, 65a). And Judge MacKinnon rejected the unions' cross-bargaining contentions, stating "[t]here is no basis in law or fact for such an absurd conclusion" (*id.* at 29a). The unions, even in this Court, have failed to identify the source of these asserted rights, arguing instead that the Commission "must assume that rail labor had such a right" (UTU Br. 25 n.13).[6]

But even if the unions had such cross-carrier bargaining rights, the unions are mistaken in contending that the Commission has no authority to approve a transaction term that affects such rights. As MKT persuasively explains (Br. 19-35), Congress has recognized that rail consolidation will necessarily affect rail employees' collectively bargained rights. The ICA accordingly instructs the

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[6] The unions have never identified any provision of a collective bargaining agreement that provides them with cross-carrier bargaining rights. And UTU, acknowledging the D.C. Circuit's decision in *Central Vermont Ry.* v. *Brotherhood of Maintenance of Way Employees*, 793 F.2d 1298 (1986), now concedes that such cross-carrier bargaining rights do not exist under the RLA (UTU Br. 43 n.23). UTU instead insists (without any citation of authority) that such rights somehow spontaneously spring into existence through the Commission's labor protective conditions (*ibid.*).

Commission to consider "the interest of carrier employees affected by the proposed transaction" (49 U.S.C. 11344(b)(1)(D)) and mandates labor protective provisions to provide compensation for displaced workers (49 U.S.C. (Supp. II) 11347). These provisions exist precisely because adjustments of working conditions inevitably accompany rail consolidations and related transactions. The courts have repeatedly recognized the Commission's power to prescribe methods for resolving labor issues that might otherwise frustrate transactions that serve the public interest. See, *e.g., Brotherhood of Locomotive Engineers* v. *Boston & Maine Corp.,* 788 F.2d at 800; *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n,* 503 F.2d 58, 62-63 (7th Cir. 1974); *Nemitz* v. *Norfolk & W. Ry.,* 436 F.2d 841, 845 (6th Cir.), aff'd on other grounds, 404 U.S. 37 (1971); *Brotherhood of Locomotive Engineers* v. *Chicago & N.W. Ry.,* 314 F.2d at 430-431.

The unions' claims are particularly far-fetched under the facts of this case. The unions essentially contend that a private agreement between *MP and its employees,* which supposedly creates "cross-carrier" bargaining rights, disables the Commission from imposing, on a merger initiated by MP, conditions designed to protect the public interest in competition.[7]

[7] The unions mistakenly contend that the Commission's authority is limited to supplementing rail labor's rights (UTU Br. 37-38), stating that "[e]mployee interests were considered and protected, not because employee protection was the price to be paid to allow a rail carrier to change rates of pay, rules or working conditions, but rather, because Congress had determined that it was not in the public's interest for rail employees to provide the economic benefits which consolidations could achieve for railroads" (*id.* at 38). That reasoning directly conflicts with this Court's observation that the purpose of the ICA's labor protective provisions is "to provide compensatory conditions" for rail employees adversely affected by rail consolidations. *Norfolk & W. R.R.* v. *Nemitz,* 404 U.S. 37, 42 (1971).

The unions are also mistaken in contending that the ICA's own labor protective provisions, 49 U.S.C. (Supp. II) 11347, prohibit the Commission from adjusting collective bargaining rights. As the Commission explained (Pet. App. 59a-60a), Section 11347 and the Commission's labor protective provisions preserve existing collective bargaining rights only to the extent that they do not conflict with implementation of an approved transaction. The amicus curiae brief of the Association of American Railroads and National Railway Labor Conference discusses this matter

The unions also place mistaken reliance (UTU Br. 40-41) on a prior Commission decision, *Southern Ry.—Control—Central of Georgia Ry.,* 331 I.C.C. 151 (1967). In *Southern,* the Commission determined that a rail carrier, consolidating operations through a Commission approved transaction, remained subject to the requirements of the Washington Job Protection Agreement (see Gov't Br. 5 n.3) and various collective bargaining agreements. However, the Commission noted that it had previously imposed those requirements as conditions of the transaction. (331 I.C.C. at 168 ("[W]e made it clear that the obligations of the collective bargaining agreements which, parenthetically, includes the Washington Agreement, should be observed in carrying out the consolidations proposed.")). There is nothing unusual in this practice. See *Norfolk & W. R.R.,* 404 U.S. at 43. Furthermore, the *Southern* decision specifically observed that the Commission's labor protective conditions supplant the RLA dispute resolution procedures (331 I.C.C. at 171). The *Southern* decision does contain dictum concerning the "independent nature of those rights" given by the Washington Agreement (*id.* at 169). However, the Commission has determined that this dictum "was not reflected in the future course of labor history and will not be followed today." See *Maine Central R.R., Georgia Pacific Corp., Canadian Pacific, Ltd. & Springfield Terminal Ry.--Exemption From 49 U.S.C. 11342 & 11343,* Finance Docket No. 30532 (I.C.C. Aug. 22, 1985) (*reprinted in* 85-792 Pet. Addendum B at 48a n.9), appeal pending, No. 85-1636 (D.C. Cir.).

at some length (Br. 24-30). We simply add that the Commission's position is entitled to considerable deference since it represents the Commission's construction of its own regulations under a statute it is charged with enforcing. See *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554, 558 (1958); see also *Hayfield Northern R.R.* v. *Chicago & N.W. Transp. Co.*, 467 U.S. at 634.

For the foregoing reasons, as well as the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROBERT S. BURK
General Counsel

HENRI F. RUSH
Deputy General Counsel

SIDNEY L. STRICKLAND, JR.
Attorney
Interstate Commerce Commission

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Nos. 85-792 and 85-793

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

INTERSTATE COMMERCE COMMISSION and
MISSOURI-KANSAS-TEXAS RAILROAD COMPANY,
Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE ENGINEERS and
UNITED TRANSPORTATION UNION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

KENNETH P. KOLSON
ASSOCIATION OF
AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2100

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

RICHARD T. CONWAY
(Counsel of Record)
WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for *Amici Curiae*

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AND NATIONAL RAILWAY LABOR CONFERENCE AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

INTEREST OF *AMICI CURIAE*

The Association of American Railroads is the trade association for the nation's railroads. Its members employ approximately 94% of the workers, operate approximately 92% of the trackage, and account for approximately 97% of the freight revenues of all railroads in the United States. The Association represents its member railroads before courts, agencies, and the Congress when matters of common concern are at issue.

Almost all of the nation's Class I railroads are members of the National Railway Labor Conference. The Conference represents member railroads both in national collective bargaining pursuant to the Railway Labor Act with unions representing their employees and in regard to other labor-management relations problems that are of concern to the railroads generally. In addition, the Conference serves as a clearing house of information regarding, and renders assistance and advice to member railroads concerning, employee protection issues that arise out of mergers and other railroad transactions governed by the Interstate Commerce Act.

This case raises the question whether labor-management disagreements arising out of rail carrier efforts to implement transactions approved by the Interstate Commerce Commission are to be resolved according to the procedures prescribed by the Interstate Commerce Act, or the procedures prescribed by the Railway Labor Act. This question is critical. Under the Interstate Commerce Act such disputes are resolved promptly by mandatory, binding arbitration; under the Railway Labor Act they may lead to strikes and other forms of self-help, interfering with interstate commerce and possibly blocking altogether the realization of transactions held to be in the public interest.

The decision of the court of appeals in this case misconstrues the relationship between the two statutes and misunderstands the effect of an approval by the Commission under the Interstate Commerce Act. It threatens serious interference with and delay to the ability of railroads to implement not only Commission-approved trackage rights transactions by operation with their own crews as traditionally has been done—which is the subject of this case—but also other kinds of transactions approved by the Commission. The AAR and the NRLC accordingly file this brief in support of the petitioners herein.[1]

STATEMENT

This case has its beginning in the approval by the Interstate Commerce Commission of the merger of the Union Pacific ("UP") and Missouri Pacific ("MP") railroads. To ameliorate the anticompetitive effect of that merger, the Commission simultaneously granted two competing carriers—the Missouri-Kansas-Texas ("MKT") and the Denver Rio Grande Western ("DRGW")—rights to operate their trains over tracks owned by MP.[2] And to protect the interests of any employees who might be adversely affected by the exercise of those rights, the Commission imposed on the carriers certain "employee

[1] Written consents from all parties to the filing of this brief have been filed with the Clerk of the Court.

[2] It has long been "a well-recognized practice among carriers to agree as to trackage rights and privileges between one another for the common use of a part of the line of one in such a manner as to make the tracks subject to the agreement a part of both roads." *Dixie Cotton Oil Co.* v. *St. Louis, I. M. & S. Ry.*, 27 I.C.C. 295, 297 (1913). The acquisition of trackage rights by a carrier "constitute[s] an 'extension' of its own railroad" and "serves the same purpose as would the acquisition of such lines by purchase or the construction by it of a like extension * * *." *Transit Comm'n* v. *United States*, 289 U.S. 121, 128-129 (1933). The Transportation Act of 1940 gave the Commission "explicit powers over trackage rights," including "fixing terms and conditions * * * for any trackage agreements entered into * * *." *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146 (1946).

protection" obligations, more fully described below. *Union Pacific-Control-Missouri Pacific*, 366 I.C.C. 462 (1982), *aff'd*, *Southern Pacific Transp. Co.* v. *ICC*, 736 F.2d 708 (D.C. Cir. 1984).

The trackage rights applications submitted to and approved by the Commission stated that the MKT would use its own employees to man its trains, and that the DRGW would have the option of doing so. (Pet. App. 62a.)[3] When the tenant carriers exercised their trackage rights the Brotherhood of Locomotive Engineers ("BLE") and the United Transportation Union ("UTU") protested to the Commission on behalf of the MP employees. They argued that the tenants' operation of their own trains with their own crews over MP tracks amounted to a change in the collective bargaining agreements relating to the working conditions of MP employees; that such a change could be lawfully effected only through collective bargaining pursuant to the major dispute procedures of the Railway Labor Act; and that the Commission has no power under the Interstate Commerce Act, to authorize a transaction effecting such a change without resort to the procedures of the Railway Labor Act. (Pet. App. 57a-59a.)[4]

[3] "Pet. App." references are to the Appendix to the petition of the Interstate Commerce Commission. Operation by the tenant carrier "with its own engines and crews * * * is the usual method by which one carrier uses tracks of another." *Gulf, M. & N. R. Co. Abandonment of Operations*, 233 I.C.C. 294, 297 (1939). Indeed, it has been held that an agreement under which the owner carrier "would furnish all necessary locomotives and crews" is not a true trackage-rights agreement, which "necessarily include[s] an operating right" ... the tenant carrier. *Chicago & E.I. R. Co. Trackage Rights*, 254 I.C.C. 603, 604, 605 (1943).

[4] Both the BLE and the UTU participated in the initial ICC proceeding and opposed the trackage rights applications generally. Neither, however, opposed the applications insofar as they would allow the tenants to use their own crews and neither raised that issue on appeal to the D.C. Circuit from the approval of the applications. Moreover, those unions also represent employees of the tenant carriers. The record shows that the unions, on behalf of those

In addition, the UTU threatened to strike the MP unless the MP refused to permit MKT crews to operate MKT trains on MP tracks. That threatened strike was enjoined. *Missouri Pac. R.R.* v. *UTU*, 580 F. Supp. 1490 (E.D. Mo. 1984), *aff'd*, 782 F.2d 107 (8th Cir. 1986), *pdg. on pet. for a writ of cert.*, No. 85-1054.

The Commission rejected the unions' arguments. It concluded, among other things, that the tenants were free to use their own crews, even if that did amount to a change in the working conditions of MP employees, because the Railway Labor Act did not apply but had been superseded for the reasons stated at length in *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424, 430-31 (8th Cir. 1963). (Pet. App. 30a.)

A divided court of appeals found the Commission's explanation inadequate. It sought to distinguish the case on which the Commission relied, and it vacated the Commission's orders on the asserted ground that the agency "did not give a shred of reasoning to support its view that completion of the transactions required shielding crew selection from the Railway Labor Act." (Pet. App. 19a, footnote omitted.)

INTRODUCTION AND SUMMARY OF ARGUMENT

1. *Introduction.* The Interstate Commerce Act contains, in Chapters 109 and 113 of Title 49 of the U.S. Code, a comprehensive and meticulous scheme for the regulation of changes in rail carrier control or operation. Chapter 109 ("Licensing") governs the extension or construction of a line of railroad (§ 10901), the sale of a line of railroad from a carrier to a noncarrier (*id.*), the abandonment of a line or the discontinuance of operations over a line (§ 10903), and the purchase of a line noticed and approved for abandonment (§ 10905). Chapter 113 ("Combinations") governs the consolidation and merger of carriers, purchases or leases or contracts to operate the properties of other carriers, acquisitions of control, and acquisitions of trackage rights over another carrier's lines (§ 11343). Before any of these actions may be taken the approval of the Interstate Commerce Commission is required.[5]

employees, have entered into agreements with the MKT—pursuant to the procedures prescribed by the Interstate Commerce Act—regarding the crewing of MKT's trains used in trackage-rights operations.

Under that statutory scheme the Commission for nearly 50 years has had power to impose employee protections as a condition of its approval of most of the actions just described. Thus, before 1940 the Commission in its discretion and without specific authority imposed protections as a condition of its approval of transactions now falling under Chapter 113. *United States* v. *Lowden*, 308 U.S. 225 (1939). Such protections were required after the Transportation Act of 1940, which "made mandatory with respect to unifications the protections for workers that had previously been discretionary." *ICC* v. *Railway Labor Exec. Ass'n*, 315 U.S. 373, 379 (1942) (footnote omitted). Similarly, before 1976 the Commission had and exercised discretionary power to impose conditions under the predecessors to Chapter 109 provisions. See *id.* In that year the Railroad Revitalization and Regulatory Reform Act amended those provisions to require protections in the case of abandonments (§ 10903) and to codify the Commission's discretion in the case of acquisitions and extensions or constructions of rail lines (§ 10901).[6] See *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 945 (9th Cir. 1986).

[5] Under § 10505, the Commission may exempt "a person, class of persons, or a transaction or service" from requirements of the Act, including those contained in Chapters 109 and 113, but such an exemption does not "relieve a carrier of its obligations to protect the interests of employees as required" in those chapters (§ 10505(g)). Hence, the preemptive effect upon the Railway Labor Act is the same regardless of whether the Commission approves a transaction under applicable provisions of Chapter 109 or 113 or exempts the transaction from those provisions.

[6] The one exception to the foregoing is that the Commission has no power to impose protections in connection with the purchase of a

Chapters 109 and 113 share more than a common history of the Commission's power to impose protections. Both chapters have the goal of an efficient and economic rail transportation system, see *ICC* v. *Railway Labor Exec. Ass'n*, *supra*, 315 U.S. at 376; the justifications for protections as recognized by this Court apply equally to both chapters, see *id.*, 315 U.S. at 377; the protections that the Commission imposes under both chapters are virtually identical;[7] and the Railway Labor Act, if it applied, would frustrate and possibly block altogether transactions under both chapters approved by the Commission as being in the public interest. For these reasons the *amici* Association of American Railroads and National Railway Labor Conference believe that the Railway Labor Act is overridden by the Interstate Commerce Act with respect to *all* transactions subject to Commission approval, whether falling under Chapter 109 or 113.

This case involves a trackage rights transaction, covered by Chapter 113. As we show below, there is an additional reason for concluding that the Railway Labor Act is superseded with respect to Chapter 113 transactions—namely, the provision in § 11341(a) that carriers participating therein are "exempt * * * from all other laws * * * as necessary to * * * carry out the transaction." But neither the presence of that provision in Chapter 113, nor our reliance on it in this case, detracts from the force of the arguments that the Railway Labor

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line approved for abandonment under § 10905 (added by the 1976 Act but significantly amended by the Staggers Rail Act of 1980, Pub. L. No. 96-448, § 402(c), 94 Stat. 1895, 1942-45). *Simmons* v. *ICC*, 766 F.2d 1177 (7th Cir. 1985); *Simmons* v. *ICC*, 760 F.2d 126 (7th Cir. 1985).

[7] Compare *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, *affirmed*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979) (merger protections under Chapter 113), with *Oregon Short Line R.R.—Abandonment—Goshen*, 360 I.C.C. 91 (1979) (abandonment protections under Chapter 109).

Act is superseded by Chapter 109 as well.[8] The *amici* make this point out of a concern that a decision by this Court favorable to petitioners in this case that relied on the presence of § 11341(a) in Chapter 113 could conceivably be construed by lower courts to prejudice the position of carriers in cases arising under Chapter 109.[9]

2. *Summary.* We show in Part I below that the court of appeals erred in ruling that the Commission's explanation for its conclusion was inadequate. The Commission's decision set forth the union's claims, and then the reasons for rejecting them. It relied heavily on, and adopted as its own, the reasoning behind *Brotherhood of Locomotive Engineers* v. *Chicago and North Western Ry.*, 314 F.2d 424 (8th Cir. 1963), which held that the Railway Labor Act is superseded by the Interstate Commerce Act in cases such as this one. In short, "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945).

In Part II we address the merits of the Commission's conclusions. We show that the procedures for resolving disputes under that Act, which at their end contemplate the union's right to strike if its demands are not met, must yield to the mandatory arbitration provisions prescribed by the Commission as the means for resolving

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[8] We are supported in our view of the preemptive effect of Chapter 109 by the experience under the Civil Aeronautics Act. Labor protections imposed on air carriers under that Act have been held to supersede inconsistent agreements under, or provisions of, the Railway Labor Act without reference to any express statutory exemption. *E.g.*, *Kent* v. *CAB*, 204 F.2d 263 (2d Cir. 1953); *accord*, *International Ass'n of Machinists* v *Northeast Airlines*, 473 F.2d 549 (1st Cir. 1972); *International Ass'n of Machinists* v. *Northeast Airlines*, 536 F.2d 975 (1st Cir. 1976); *American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir. 1971).

[9] Pending cases involving the relationship between Chapter 109 (either directly or indirectly by reason of a § 10505 exemption) and the Railway Labor Act include *Railway Labor Exec. Ass'n* v. *Butte, Anaconda and Pac. R.R.*, No. 85-3875 (9th Cir.) and *Railway Labor Exec. Ass'n* v. *Staten Island R.R.*, —— F.2d —— (2d Cir., No. 85-7483, May 22, 1986).

disputes stemming from carrier efforts to implement transactions the Commission has approved as being in the public interest. A contrary result would mean that labor, already entitled in many instances under the Interstate Commerce Act to federally imposed protections unparalleled elsewhere in American industry, would have a veto power over the implementation by carriers of approved transactions. As a host of lower court decisions supporting our view demonstrates, Congress meant to encourage rail consolidations under the Interstate Commerce Act, and could not have meant to frustrate that goal by giving rail labor, in addition to the statutorily mandated protections, the right to delay or block those transactions altogether.

3. In Part III we support the Commission's construction of § 11341(a) as self-executing. That section of the Interstate Commerce Act requires no action by the Commission whatever. The factors required to be considered by the Commission appear in §§ 11343 and 11344. Once the Commission after considering those factors approves a transaction, a question may subsequently arise as to whether or not it is "necessary" under § 11341(a) for the carrier participants to be relieved of the operation of some other law, but the answer will ordinarily not depend on whether the Commission has made any "necessity" determination as part of its decision approving the transaction in the first place.

4. Finally we show that the unions err in contending that the Railroad Revitalization and Regulatory Reform Act of 1976 amended the Interstate Commerce Act to somehow revivify the role of the Railway Labor Act in the implementation of ICC-approved transactions. The provision in the 4-R Act on which the unions rely was added without a shred of debate and it is inconceivable that Congress was effecting so major a change in the law, and introducing so large a hurdle to the accomplishment of the goals of the Interstate Commerce Act, without a word being said about the matter by any member of Congress or any representative of rail labor or management.

ARGUMENT

I. THE COMMISSION ADEQUATELY EXPLAINED ITSELF

The Commission's reasoning in its October 19, 1983 decision "may reasonably be discerned." *Bowman Transp., Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974). It set out the issues for decision by stating the unions' claims: "that this Commission has no jurisdiction over crew assignment disputes and that they must be settled under the procedures of the Railway Labor Act" and that the Commission's approval of the trackage rights transaction could not "immunize [that] transaction from the requirements of the RLA" or authorize the carriers to make "unilateral changes of collective bargaining agreements." (Pet. App. 57a.) The Commission than went on to reject those arguments, ruling that its approval of a transaction covered by § 11343—

> "exempts such a transaction from the requirements of all laws as necessary to permit the transaction to be carried out, and includes an exemption from the requirements of the RLA. *See Brotherhood of Loc. Eng.* v. *Chicago & North Western Ry. Co.*, 314 F.2d 424, 432 (8th Cir. 1963), *cert. denied* 375 U.S. 819 (1963)." (Pet. App. 59a.)

It also ruled (*id.* 60a):

> "To the extent that existing working conditions and collective bargaining agreements conflict with a transaction which we have approved, those conditions and agreements must give way to the implementation of the transaction."

And then the Commission explained why (*id.*):

> "If our approval of a transaction did not include authority for the railroads to make necessary changes in working conditions, subject to payment of specified benefits, our jurisdiction to approve transactions requiring changes of the working conditions of any employees would be substantially nullified. Such a result would be clearly contrary to

congressional intent. The discussion of this point in *Brotherhood of Loc. Eng.* [v. *Chicago and North Western Ry. Co.*, 314 F.2d 424, 430-31 (8th Cir. 1963)] is persuasive and we conclude that this reasoning is unaffected by the enactment of the 4-R Act."

The Commission's two citations to the Eighth Circuit's decision in the *Chicago and North Western* case (hereinafter "*BLE* v. *CNW*"), and its adoption of the reasoning there as its own, make clear the basis for its finding that the crew selection provisions of the approved trackage rights agreements were exempt from the provisions of the RLA.[10] In short, while the organization of the decision of the Commission may not be flawless, "[t]he path which it followed can be discerned." *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 595 (1945). See also *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 532-33 (1946); *ICC* v. *Columbus & Greenville Railway*, 319 U.S. 551, 555 (1943).

II. THE COMMISSION'S CONCLUSIONS WERE CORRECT

A. The Interstate Commerce Act Provides A Comprehensive Scheme Encouraging Rail Consolidations And Protecting the Interests of Labor.

The Interstate Commerce Act favors rail mergers and other types of rail consolidations. That has been true for over 60 years. The post-World War I period was a time of great uncertainty and financial crisis for the nation's

[10] See *Shepard* v. *NLRB*, 459 U.S. 344, 348-52 (1983), in which this Court upheld the Board's decision to forgo a requirement of reimbursement as a remedy for violation of § 8(e) of the National Labor Relations Act. The Board's reasoning on that issue was confined to a footnote and was "something less than a model of precise expository prose," but the Court was able to glean "the sense of the Board's explanation," in part by a reading of a decision that the Board had merely cited in the explanatory footnote. *Id.* 350.

railroads, largely because of waste and inefficiency caused by extensive duplication of facilities and services.[11] Congress responded with the Transportation Act of 1920, 41 Stat. 456, where "consolidation of the railroads of the country, in the interest of economy and efficiency, became an established national policy * * *." *United States* v. *Lowden*, 308 U.S. 225, 232 (1939). That Act, however, left consolidation largely to the Commission's efforts, and proved insufficient to its end. Congress accordingly reaffirmed and reinforced the national policy by giving rail carriers principal authority to initiate unifications in the Transportation Act of 1940, 54 Stat. 898, the chief goal of which was " 'to facilitate merger and consolidation in the national transportation system.' " *Brotherhood of Maintenance of Way Employes* v. *United States*, 366 U.S. 169, 173 (1961).

The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, continued pursuit of the national policy. It "was an attempt to restructure the railroad industry in the face of chronic financial losses and line closures." *Railway Labor Exec. Ass'n* v. *ICC*, 784 F.2d 959, 965 (9th Cir. 1986). It sought to promote an efficient rail transportation system through (among other things) "the encouragement of efforts to restructure the system on a more economically justified basis, including planning authority [for mergers] in the Secretary of Transportation, an expedited procedure for determining whether merger and consolidation applications are in the public interest, and continuing reorganization authority * * *." § 101(a)(2), 90 Stat. 33, 45 U.S.C. § 801(a)(2).[12]

[11] See 1 I. L. Sharfman, *The Interstate Commerce Commission* 172-173 (1931).

[12] See Senate Rep. No. 94-499, 94th Cong., 1st Sess. 20-21 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 14, 34 ("Title IV of this bill is intended to encourage mergers, consolidations and joint use of facilities that tend to rationalize and improve the

Throughout this entire period the Commission's approval has been required for mergers, consolidations and other transactions falling within what is now § 11343. The Commission's jurisdiction over these transactions is "exclusive," and carriers participating in approved transactions are "exempt * * * from all other law * * * as necessary to let that person carry out the transaction * * *." § 11341(a).

A more efficient and hence viable rail transportation system will ultimately benefit the public at large and preserve jobs for rail labor. Yet Congress has long recognized that the economies it sought to encourage through rail mergers are often achieved by the abolishment of duplicative facilities, resulting in the dismissal of employees or their displacement to lower paying jobs.[13] Its response, since the Transportation Act of 1940, has been to require the Commission in determining whether to grant an application subject to § 11343 to consider (among other things) "the interest of carrier employees affected by the proposed transaction," § 11344(b)(1)(D), and if it approves the application the Commission "shall require the carrier to provide a fair arrangement" to protect employees adversely affected by the transaction. § 11347. The Commission accordingly has established a comprehensive set of "protections" to be afforded em-

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Nation's rail system, and requires the Commission * * * to reach a [prompt] decision * * *." Section 401 "empowers the Secretary to develop plans, proposals and recommendations for mergers, consolidations and other coordination projects * * *.").

[13] See *Railway Labor Exec. Ass'n* v. *United States*, 339 U.S. 142, 147-148 (1950), noting "a widespread awareness in the railroad industry that many of the economies to be gained from consolidations * * * could be realized only at the expense of displaced railroad labor" and that "[t]he legislative history of § 5(2)(f) [now § 11347] shows that one of its principal purposes was to provide mandatory protection for the interests of employees affected by railroad consolidations."; *Division No. 14, Order of R.R. Tel.* v. *Leighty*, 298 F.2d 17, 17-18 (4th Cir. 1962).

ployees adversely affected as a result of approved rail mergers, consolidations and common control transactions,[14] and lease and trackage rights transactions.[15]

Under these protective conditions, an employee who is dismissed from a job or displaced to a lower paying position as a result of the approved transaction will continue to receive, generally for six years, the equivalent of the wage he or she was earning at the time of the adverse effect, indexed in accordance with subsequent general wage increases; moving expenses are provided if relocation is necessary; and transfers of work are subject to "implementing agreement" provisions regarding the allocation of seniority or other contract rights of affected employees. In addition, if the carrier and the union representing its affected employees are unable to come to terms over an implementing agreement, the parties must submit their dispute to expedited, binding arbitration. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 94.

B. The Railway Labor Act, If It Applied, Would Interfere With and Could Defeat the Goals of the Interstate Commerce Act.

The carefully constructed statutory scheme we have just described would be set at naught if unions could insist that carriers, in addition to securing the approval of the Commission to engage in the transactions listed in § 11343, and complying with the employee protective

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[14] *New York Dock Ry.—Control—Brooklyn Eastern District*, 360 I.C.C. 60, 84-90 (1979), *affirmed*, *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). The Second Circuit's decision in this case contains an extensive history of the conditions imposed over the years by the Commission.

[15] *Norfolk and Western Ry.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), *as modified by Mendocino Coast Ry.—Lease and Operate—California Western R.R.*, 360 I.C.C. 653 (1980), *affirmed*, *Railway Labor Exec. Ass'n* v. *United States*, 675 F.2d 1248 (D.C. Cir. 1982).

conditions imposed by the Commission under § 11347, must also follow the "major dispute" procedures of the Railway Labor Act ("RLA") before consummating a transaction that the Commission has approved as being in the public interest.

"Major" disputes arise under that Act when labor or management seeks to change the rates of pay, rules, or working conditions established in existing collective bargaining agreements. *Elgin, Joliet & Eastern Ry.* v. *Burley*, 325 U.S. 711, 723 (1945). Because the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes,'" *Texas and New Orleans R.R.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 565 (1930), the Act requires the parties to such a dispute to follow certain prescribed procedures designed to maximize the possibility of reaching agreement. Those procedures are "purposely long and drawn out," *Railway Clerks* v. *Florida East Coast Ry.*, 384 U.S. 238, 246 (1966), and their exhaustion is "almost an interminable process." *Detroit and Toledo Shore Line R.R.* v. *UTU*, 396 U.S. 142, 149 (1969).[16] It is not uncommon for the procedures to drag on for two years or more. At their ultimate conclusion, however, the parties may resort to self-help, including a strike by a union if its demands have not been met. *E.g.*, *Railway Clerks* v. *Florida East Coast Ry.*, *supra*, 384 U.S. at 243-44.

[16] In *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969), this Court described the Act's "detailed framework to facilitate the voluntary settlement of major disputes";

> "A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10."

Those demands may be inconsistent with the carrier's ability to implement the transaction approved by the Commission, as an example may illustrate. Recently the Commission approved the common control of three railroads in the Northeast.[17] It did so because common ownership would produce "substantial" public benefits in several areas, including operating efficiencies to be "achieved through consolidation of maintenance and repair facilities." [18] Yet when the carriers sought to consolidate their facilities the International Association of Machinists sued to prevent them from doing so, arguing that the carriers were obliged to bargain under the RLA over demands by the union that each of three carriers add to its collective bargaining agreement a provision effectively barring the transfer of repair work from one carrier to another. Those demands, if agreed to by the carriers, would have forbidden the consolidation.[19]

[17] *Guilford Transp. Ind., Inc.—Control—Boston and Maine Corp.*, 366 I.C.C. 292, 338 (1982), *aff'd in relevant part, Lamoille Valley R.R.* v. *ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transp. Ind., Inc.—Control—Delaware and Hudson Ry. Co.*, 366 I.C.C. 396 (1982), *aff'd in relevant part, Central Vermont Ry.* v. *ICC*, 711 F.2d 331 (D.C. Cir. 1983).

[18] 366 I.C.C. at 338; see also *id.* at 402.

[19] Complaint in *International Assoc. of Machinists* v. *Boston and Maine Corp.*, No. 84-3703-T (D. Mass.). A Stipulated Order of Dismissal ended the case on February 24, 1986.

Another recent example (though arising under Chapter 109) can be found in *Railway Labor Exec. Ass'n* v. *Staten Island R.R.*, —— F.2d —— (2d Cir., No. 85-7483, May 22, 1986). In December 1984 the carrier applied for ICC approval of a proposed transaction. Four unions *later* served bargaining demands that the carrier pro-

In other cases, a union may strike if a carrier implements an approved transaction without first seeking to change the existing collective bargaining agreement through the RLA major dispute procedures, as would have occurred in connection with the approved transaction involved in this case but for the strike injunction recently affirmed by the Eighth Circuit. See p. 4 *supra*. If the carrier should be required to utilize the RLA procedures, the result at a minimum will be delay in its ability to implement the approved transaction. And if at the end of those procedures the union has not agreed to change the collective bargaining agreement, then the carrier will face the choice either of foregoing what the Commission has approved as being in the public interest, or taking a strike.

C. The ICC, Following *BLE* v. *CNW*, Rightly Ruled That the Railway Labor Act Is Superseded.

Because the application of the RLA could defeat the Interstate Commerce Act scheme for approving mergers, etc. subject to employee protections, the Eighth Circuit, in the *BLE* v. *CNW* decision relied on by the Commission, ruled that the RLA was among the laws from which carrier participants in ICC-approved transactions are exempt. It relied in turn on the legislative history

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vide them 6 months' advance notice of such proposed transactions. The ICC issued an order of approval on April 24, 1985 and the next day the unions sued to enjoin the transaction, arguing that the carrier in implementing the approved transaction had violated the RLA by changing the *status quo* during the pendency of bargaining demands. The complaint was dismissed for failure to state a claim upon which relief may be granted.

On many rail properties unions recently have served bargaining demands that if agreed to by the carriers would block or impede ICC-approved transactions. The carriers generally view the demands as nonmandatory subjects of bargaining. Some litigation on that score has commenced (*e.g.*, *Burlington Northern R.R.* v. *UTU*, No. 86-5013-CV-SW-C (D.Mo.)) and more is inevitable.

of the Transportation Act of 1940, which as noted above amended the Interstate Commerce Act to make employee protective conditions mandatory in Chapter 113 transactions. In passing that Act Congress rejected a proposed amendment—the "Harrington" amendment—that would have forbidden carriers from abolishing jobs or impairing existing employment rights as a result of a merger or other transaction needing the Commission's approval under § 11343. That amendment, the Eighth Circuit noted, " 'threatened to prevent all consolidations to which it related.' " *Id.* at 430 (quoting *Railway Labor Executives' Ass'n* v. *United States*, *supra*, 339 U.S. at 151).[20] Its defeat fortified the conclusion that Congress intended the ICC-prescribed protective conditions rather than the RLA to govern the adjustments caused by merger implementations, for if the RLA were to govern it would allow the nullification of Commission-approved transactions:

> "[T]he ICC power to authorize mergers would be completely ineffective if authority to adjust work realignments through fair compensation did not exist. * * * Under the Railway Labor Act in a major dispute employees cannot be compelled to accept or arbitrate as to new working rules or conditions. * * * Thus under the Railway Labor Act provisions, it is possible for either party to completely block any change in working conditions by refusing to agree to a change and by refusing to arbitrate. Like the Harrington amendment, the Railway Labor Act, if it applied, would threaten to prevent many consolidations." *Id.* at 430-431.

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[20] This Court, in *Brotherhood of Maintenance of Way Employes* v. *United States*, *supra*, 366 U.S. at 173-77, relied heavily upon the legislative history growing out of the Harrington amendment in rejecting a union contention that the predecessor of § 11347 required a "job freeze," and holding that compensatory employee protections are adequate.

The Eighth Circuit accordingly concluded that the RLA was one of the laws from which carrier participants in ICC-approved transactions are exempt under § 11341(a) in implementing those transactions. *Id.* at 431-32.[21]

That decision does not stand alone. Others to the same effect include *Brotherhood of Loc. Eng.* v. *Boston & Maine Corp.*, 122 LRRM 2020, 2025 (1st Cir., April 9, 1986) (ICC exemption of lease transaction and imposition of employee protections under § 10505 "exempted B&M from the conditions of the RLA with respect to major disputes."); *Missouri Pac. R.R.* v. *UTU*, 782 F.2d 107, 111 (8th Cir. 1986) (affirming district court holding "that MOPAC is exempted under § 11341(a) * * * from the requirements of the Railway Labor Act"); *Burlington Northern, Inc.* v. *American Railway Supervisors Ass'n*, 503 F.2d 58, 62-63 (7th Cir. 1974) (employee protections ordered by ICC pursuant to merger are controlling in case of conflict with RLA procedures); *Bundy* v. *Penn Central Co.*, 455 F.2d 277, 279-80 (6th Cir. 1972) (minor dispute procedures of RLA are overridden by ICC-imposed order under § 5(2)(f) [now § 11347]); *UTU* v.

[21] In *BLE* v. *CNW* the employee protective conditions imposed by the ICC were agreed to by the carrier and the union before the merger. The statute permits the parties to make such pre-merger agreements and to submit them to the Commission for approval. 49 U.S.C. § 11347. If it approves, the agreement has the force of and becomes a Commission order. *Norfolk and Western Ry.* v. *Nemitz*, 404 U.S. 37 (1971).

Respondents may seek to distinguish *BLE* v. *CNW* by suggesting that the result there reflected a determination by the court that the union having agreed to the protective conditions thereby waived its ability to invoke RLA procedures. But no such analysis appears in the decision and in any event would be incorrect if it led to the conclusion that unions which do not enter into pre-merger agreements *are* free to invoke the RLA. As the Eighth Circuit ruled, the transaction is exempted from the restraints of the RLA to the extent necessary to carry out the transaction (314 F.2d at 432), not on a theory of union waiver but because otherwise unions could stymie Commission-approved transactions.

Norfolk & Western Ry., 332 F. Supp. 1170, 1174 (N.D. Ohio 1971) ("plain language" of Interstate Commerce Act conferred "exclusive and plenary jurisdiction upon the ICC to approve mergers and relieve carriers from all other restraints of federal law, without carving a specific exception with regard to the Railway Labor Act"). And the Sixth Circuit ruled in *Nemitz* v. *Norfolk & Western Ry.*, 436 F.2d 841, 845 (6th Cir.), *aff'd on other grounds*, 404 U.S. 37 (1971), in language echoing the Eighth Circuit's quoted above:

> "The authority vested in the I.C.C. to effectuate proposed mergers would be rendered ineffective if authority to adjust work realignments through fair compensation did not exist. Since, under the Rail-Way Labor Act, employees cannot be compelled to accept or arbitrate new working rules or conditions, the application of the Railway Labor Act to situations such as that presented here, like the Harrington Amendment, would threaten to prevent many consolidations, and, therefore, should not be applied."

See *Kent* v. *CAB*, *supra*, 204 F.2d at 266, which held that a collective bargaining contract under the RLA "must yield to the paramount power of the [Civil Aeronautics] Board to perform its duties under the" Civil Aeronautics Act to approve mergers "upon such terms as it determines to be just and reasonable in the public interest." *Accord*, *IAM* v. *Northeast Airlines*, 400 F. Supp. 372, 373-74 (D. Mass. 1975), *aff'd*, 536 F.2d 975 (1st Cir. 1976) (RLA "is not applicable where the dispute arises out of a merger" because "Congress has provided a special mechanism for resolving the numerous problems attendant on such a merger"); see also cases cited note 8, p. 7, *supra*.[22]

[22] *Texas & New Orleans R.R.* v. *Brotherhood of Railroad Trainmen*, 307 F.2d 151 (5th Cir. 1962), conflicts in certain respects with the authorities cited in the text. There the court ruled that the Norris-LaGuardia Act barred it from enjoining a threatened strike

D. Override of the Railway Labor Act Is Required in This Case.

The result reached in the many cases just mentioned has special—and we might add obvious—force in this case. The rights of the MKT and the DRGW to use their own crews were expressly recognized by the Commission to be material terms of each of the trackage rights applications it approved as being in the public interest. (Pet. App. 67a.) If the RLA were to apply to the crew selection process, the transaction approved by the Commission could be postponed while the "almost interminable" major dispute procedures of that Act were exhausted, or indeed frustrated altogether by threat of or resort to strike. Indeed, as we have noted, the MP's employees have already threatened and been enjoined from striking over this very matter.

The possibility that MP crews could resort to self help against the tenants has, if anything, even graver consequences. The very purpose of the grant of trackage rights was to protect and foster a competitive relationship between the tenants and the MP. It is inconceivable in the first instance that the MKT (for example) should have to bargain with and rely on MP employees in seeking to wrest new or protect existing traffic from the MP. And it would be astonishing if, as a result of a transaction approved by the Commission to maintain competition between the MP and the MKT, Congress intended to permit MP employees to interfere with and possibly

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over the carrier's effort to implement an ICC-approved transaction. We believe that the court erred in holding that § 11347 [then § 5(2)(f)] of the Interstate Commerce Act is not part of the pattern of the national labor legislation to which the Norris-LaGuardia Act must be accommodated. See *United States* v. *Lowden*, 308 U.S. 225, 236-38 (1939). In any event, even in that case the court acknowledged that union resorts to the RLA that were "contrary to the public interest" in the context of ICC-approved transactions would be unenforceable. 307 F.2d at 161-62.

shut down the MKT's entire operations. Moreover, if the MP employees demand, upon pain of strike, that MP ban MKT trains with MKT crews, and the MKT's employees demand, upon pain of strike, that MKT not hire MP crews, a stalemate will result. Commerce will be interrupted and the Commission's approval of the trackage rights applications will be nullified. And finally, use of MP crews to operate MKT trains obviously would require the approval of the MP, which would thus be empowered to frustrate the competition that the Commission intended to protect and preserve.

In the case at bar the court of appeals sought to distinguish *BLE* v. *CNW* on the ground that the Eighth Circuit in that case "recognized that immunity attached only to obstacles that would frustrate fruition of the" ICC-approved transaction. (Pet. App. 18a.) But as we have shown above, and as the Commission ruled below, the RLA major dispute procedures, if applicable to the crew selection process, *would* be an obstacle to fruition of the approved trackage rights transactions. Thus the court's distinction is one without a difference. The rationale of that case is fully applicable to this one and the Commission adopted it in concluding that the carriers herein are exempt from the major dispute procedures of the RLA in implementing the approved trackage rights transactions.

III. SECTION 11341(a) IS SELF-EXECUTING

Section 11341(a) provides in pertinent part:

> "A carrier * * * participating in * * * a transaction approved by * * * the Commission under this subchapter may carry out the transaction * * * without the approval of a State authority. A carrier * * * participating in that approved * * * transaction *is exempt* from the antitrust laws and from all other law, including State and municipal law, as necessary to let that person carry out the transaction * * *." (Emphasis added.)

As that plain language makes clear, the Commission is not called upon to do anything under § 11341(a). The types of transactions (including trackage rights transactions) that require Commission approval are set out in § 11343, and the criteria according to which the Commission is directed by Congress to grant or deny approval are set forth in § 11344. In particular, § 11344(c) provides that the Commission shall grant approval if "it finds the transaction is consistent with the public interest." Section 11341(a) then provides, without requiring further Commission interposition, that a carrier participant "is exempt from the antitrust laws and from all other law * * * as necessary to let that person carry out" the transaction that the Commission has approved. The Commission itself, in determining under § 11344 whether the public interest warrants approval of a proposed transaction, is not required to determine, or to make any findings, whether it would be "necessary" to override some particular law to effectuate the transaction if approved. See *Schwabacher* v. *United States*, 334 U.S. 182 (1948).[23]

That is the point the Commission was making when, in answer to the contention of the unions that its initial orders approving the trackage rights applications did not expressly state that the carriers were exempt from the RLA, it said (Pet. App. 60a):

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[23] In *Schwabacher*, the Court explained that Commission approval of a proposed railroad merger "is dependent upon three, and upon only three considerations," those then set forth in the predecessor to § 11344. Following Commission approval, the "approved transaction goes into effect without need for invoking any approval under state authority, and the parties are relieved of 'restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved * * *.'" 334 U.S. at 194-195. *BLE* v. *CNW* and other such decisions by the lower courts in cases involving the RLA are consistent with that decision; the decision below is not.

> "The terms of section 11341 immunizing an approved transaction from any other laws are self-executing and there is no need for us expressly to order or to declare that a carrier is specifically relieved from certain restraints."

And that is precisely what the Eighth Circuit ruled in rejecting a similar contention by the union in *BLE* v. *CNW* that the Commission had failed to make an express finding of exemption. The court held that the Commission's approval of a transaction, and its imposition of the required employee protections, "carried with it any exemption from the restraints of other laws as contemplated by § 5(11) [now § 11341(a)] to the extent necessary to carry out the merger." 314 F.2d at 432. See *Brotherhood of Locomotive Engineers* v. *Boston and Maine Corp.*, *supra*, 122 LRRM at 2025 ("We also note that the exemption provision, § 11341(a), is self-executing.").

It is true that the Commission's approval of a transaction immunizes the carrier participants from the RLA only to the extent necessary to implement the transaction. Thus it may be that, subsequent to the Commission's order of approval, a union will argue that the carriers are seeking more immunity from the major dispute procedures of the RLA than is necessary to implement the approved transaction. In such a case the issue for decision will be whether application of the RLA would frustrate or impede an action intended to implement the approved transaction; if so, then the carriers are exempt from the RLA under § 11341(a); if not, the RLA may apply. The issue will not turn on whether the Commission, in its order of approval, made any findings of the need for an exemption under § 11341(a) from some other statute for, as shown above, that section requires no action whatever by the Commission in passing on an application subject to § 11343. Rather, the function of the Commission under § 11344 is to determine whether a

grant of the application is in the public interest and otherwise comports with the standards specified therein.[24]

The court of appeals' misunderstanding of § 11341(a) led it to the erroneous conclusion that the Commission "rejected the notion that it had to provide some basis for concluding that waiver of the Railway Labor Act was necessary" to the transaction it had approved. (Pet. App. 10a.) As we have shown, the Commission correctly construed § 11341(a) as not requiring findings with respect to exemption in the initial order of approval. When the issue of exemption subsequently arose, the Commission adequately explained why the crew selection process necessarily was exempt from the RLA. On both counts the Commission's decision is squarely in keeping with the statute and with *BLE* v. *CNW* and the other decisions cited above.

IV. THE 4-R ACT DID NOT AMEND THE LAW TO ALLOW THE RAILWAY LABOR ACT TO INTERFERE WITH TRANSACTIONS APPROVED BY THE COMMISSION

In the court below the respondents urged that the result in *BLE* v. *CNW* was overturned by the Railroad Revitalization and Regulatory Reform Act of 1976 (the "4-R Act"). Section 402(a) of that Act (90 Stat. 62) added a sentence to § 11347 (then § 5(2)(f)) requiring that henceforth the employee protective conditions to be imposed by the Commission shall be "no less protective * * * than those heretofore imposed pursuant to this subdivision and those *established pursuant to section 405 of the Rail Passenger Service Act* (45 U.S.C. 565)." (Emphasis added.) The latter act created Amtrak and permitted railroads providing intercity passenger service to transfer that service to Amtrak by contract. Section 405 required such contracts to contain employee protective conditions certified as "fair and equitable" by the Secretary of Labor, and it directed the inclusion of such protective conditions as may be

> "necessary for (1) the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) to such employees under existing collective-bargaining agreements or otherwise; (2) the continuation of collective-bargaining rights; (3) the protection of such individual employees against a worsening of their positions with respect to their employment; [etc.]."

On April 17, 1971, the Secretary approved and certified certain conditions which came to be known as the "Appendix C-1" conditions, so called because they were an appendix to the standard contract between Amtrak and the contracting railroads.[25] In keeping with § 405's direction, Article I, § 2 of those conditions included the following:

> "The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits * * * of railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes." [26]

Since that is one of the conditions "established pursuant to Section 405 of the" Amtrak Act, the Commission after

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[24] This is not to say that an opponent of an application could not contend in the initial agency proceeding that the grant of the application would be contrary to the public interest in a particular case if the result would be to override rights under another statute such as the RLA. The Commission might well have a duty to consider such a contention, although no such contention was made in the initial agency proceeding below regarding the terms of the trackage right applications relative to crew selection.

[25] In *Congress of Railway Unions* v. *Hodgson*, 326 F. Supp. 68, 76 (D.D.C. 1971) the court upheld the Appendix C-1 conditions against a challenge from labor that they were insufficiently protective of employees.

[26] The Amtrak Appendix C-1 conditions are reproduced as an appendix to *Oregon Short Line R. Co.—Abandonment—Goshen*, 354 I.C.C. 76, 90-96 (1977).

passage of the 4-R Act has included it (with minor changes) in those imposed under § 11347 of the Interstate Commerce Act. See, *e.g.*, Article I, § 2 of the *New York Dock* conditions, 360 I.C.C. at 84; see generally *New York Dock Ry.* v. *United States*, 609 F.2d 83 (2d Cir. 1979). Respondents asserted below that that condition imported the RLA into the implementation of transactions approved under Chapter 113.

We have shown above that the RLA, if it applied, would gravely threaten the success of the long-standing congressional goal of encouraging rail mergers and consolidations. A similar threat, in the form of the Harrington amendment forbidding changes in existing employment rights as a result of a merger, was turned back by Congress in 1940. Page 17, *supra*. It stands to reason that if by passage of the 4-R Act Congress meant to thrust the major dispute procedures of the RLA in the way of carrier efforts to implement ICC-approved mergers, and permit unions to delay and indeed strike over such efforts, some notice would have been taken. Yet the legislative history of the 4-R Act on this point is silent. See *New York Dock Ry.* v. *United States*, *supra*, 609 F.2d at 93.[27] "This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely." *Edmonds* v. *Compagnie Generale Transatl.*, 443 U.S. 256, 266-67 (1979); see *Watt* v. *Alaska*, 451 U.S. 259, 270-271 (1981).

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[27] The provision which became § 402(a) of the 4-R Act first appeared in H.R. 10979, the House version of the Act, in identical form in all relevant respects to its final enactment. The House Report of the Committee on Interstate and Foreign Commerce accompanying the bill paraphrases but otherwise does not discuss the amendment. The Senate bill, S. 2718, contained no provision comparable to what became § 402(a). The Conference Report does not mention why the House-proposed amendment to § 5(2)(f) was agreed upon.

Floor debate concerning the meaning of employee protection provision in the 4-R Act was similarly limited. Only one Congressman, Representative Skubitz, commented on the extent of such protection and that comment came in the context of a provision mandating

The Commission's construction of the statute as preserving existing collective bargaining rights only to the extent that they do not conflict with the implementation of an approved transaction (Pet. App. 59a-60a), furthers rather than frustrates the goals of the Act and accordingly warrants respect here. *Hayfield Northern R.R.* v. *Chicago and North Western Transp. Co.*, 467 U.S. 622, 634 (1984) ("The Commission's position, of course, is entitled to considerable deference since it represents the construction of a regulatory statute by the agency charged with the statute's enforcement.").

The history of the Amtrak Act § 405 conditions further supports the Commission's construction. Section 405 was copied almost verbatim—and almost without discussion—from § 13(c) of the Urban Mass Transportation Act of 1964, 49 U.S.C. app. § 1609(c).[28] That Act provided federal aid to state and local governments for the provision of mass transportation facilities and equipment. The purpose of § 13(c) was to preserve the collective bargaining rights of affected employes when federal funds were utilized to purchase a private transit company, since many state and local governments denied such rights to

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employee protection arrangements in abandonments. That section, Congressman Skubitz stated, only provided "a restatement of what the Commission already does * * *." 121 Cong. Rec. 41340 (1975).

[28] Representatives of labor said that "[t]he protective provisions in this section are drawn literally from the comparable provisions of the Urban Mass Transportation Act of 1964 * * * and are designed to serve the identical policy expressed in these laws." *Supplemental Hearings on H.R. 17849 and S. 3706 before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 91st Cong., 2d Sess. 122 (1970) (Statement of Al H. Chesser, National Legislative Director, United Transportation Union, also representing the Congress of Railway Unions). Secretary of Labor Shultz noted: "I assume that the coverage under the protective arrangement provision * * * is substantially of the same scope as the protective arrangements provision * * * of the Urban Mass Transportation Act." *Id.* at 65 (letter from George P. Shultz).

their employees. See *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union*, 457 U.S. 15, 17 (1982); *Division 1287, Amalgamated Transit Union* v. *Kansas City Area Transp. Authority*, 582 F.2d 444 (8th Cir. 1978).

It was not the intention of the Amtrak conditions, however, to allow collective bargaining rights and agreements to prevent implementation of an approved transaction. Rather, Article I, § 4, of Appendix C-1 (reproduced at 354 I.C.C. 90-91) provided for the negotiation of implementing agreements with respect to a transaction "which will result in a dismissal or displacement of employees or rearrangement of forces" (354 I.C.C. at 91) and, in default of such an agreement, for binding arbitration. Except for allowing greater expedition, which was justified by, among other things, "the time element written into the [Amtrak] statute," that provision in Appendix C-1 was patterned after Sections 4 and 5 of the Washington Job Protection Agreement as incorporated by the I.C.C. in prior employee protection conditions. *Congress of Railway Unions* v. *Hodgson, supra*, 326 F. Supp. at 75-76.[29] Sections 4 and 5 provided a means whereby prohibitions in collective agreements that would impede implementation of a transaction, such as a "prohibition against transferring work from one railroad to another," could be overcome without resort to the procedures of the Railway Labor Act. *Southern Ry. Co.—Control—Central of Georgia Ry. Co.*, 331 I.C.C. 151, 165 (1967). "[W]ithout something comparable to it, section 6 of the Railway Labor Act * * * would seriously impede mergers." *Id.* at 171. Thus, for example, an arbitration award under Art. I, § 4, of Appendix C-1 provided for

[29] The Act required Amtrak to commence passenger service within six months of its enactment. See 326 F. Supp. at 76. In the *Hodgson* case, the unions contended (unsuccessfully) that Sections 4 and 5 of the Washington Agreement should have been "incorporate[d] verbatim" into Appendix C-1, rather than that a provision for such implementing agreements and arbitration was inappropriate altogether. 326 F. Supp. at 75.

the use of Milwaukee engineers—rather than Burlington Northern engineers—in operating Amtrak trains over some 11 miles of BN track so as to eliminate an otherwise unnecessary stop to change crews east of Minneapolis. See *Engineers* v. *Burlington Northern, Inc.*, 92 LRRM 3436 (D. Minn. 1976).

As we have noted, the conditions imposed under § 11347 include a similar provision for implementing agreements and for arbitration in default of an agreement.[30] Indeed, in connection with the *New York Dock* transaction itself, an arbitration award arising out of that provision provided for consolidation of the employees and seniority rosters of the merged railroads as New York Dock employees subject to a common seniority roster under New York Dock's collective agreements, thus displacing the seniority roster and collective agreements of the carrier acquired by New York Dock insofar as its employees were concerned. See *Locomotive Engineers* v. *New York Dock Rail Road*, 94 Labor Cases ¶ 13,704 (E.D.N.Y. 1981), *subsequent opinion*, 97 Labor Cases ¶ 10,007 (E.D.N.Y. 1982).[31]

[30] Article I, § 4, of *New York Dock* (see 360 I.C.C. at 85) more closely followed Sections 4 and 5 of the Washington Agreement as incorporated in prior ICC protective conditions in that it did not include the greater expedition authorized by the cognate provision in Appendix C-1, while Article I, § 4, of the *Norfolk and Western* and *Mendocino Coast* conditions (see 354 I.C.C. at 610-611) did provide for such expedition. The unions supported the New York Dock conditions in *New York Dock Ry.* v. *United States, supra*, 609 F.2d 83, and objected (unsuccessfully) to the expediting aspects of the latter conditions in *Railway Labor Exec. Ass'n* v. *United States, supra*, 675 F.2d at 1248, but did not object then—as they did not object in regard to Appendix C-1—to provision for implementing agreements and arbitrations under which work and forces could be rearranged in a manner inconsistent with provisions in collective bargaining agreements. That tactic of so objecting was not adopted until after the terms of the employee protective conditions had been fixed.

[31] Such consolidation of seniority rights—which necessarily involves departures from collective agreement provisions—is among

In sum, virtually without discussion a provision conditioning federal grants on the willingness of local government to permit their mass transit employees to engage in collective bargaining has made its way into the employee protections provided under the Interstate Commerce Act. However, both the provenance of that provision and its application demonstrate that the Commission correctly concluded that the 4-R Act was not intended to amend existing law in a manner that would allow the RLA to interfere with transactions approved under Chapter 113 of the Interstate Commerce Act.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

KENNETH P. KOLSON
ASSOCIATION OF
AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2100

DAVID P. LEE
General Counsel
NATIONAL RAILWAY
LABOR CONFERENCE
1901 L Street, N.W.
Washington, D.C. 20036
(202) 862-7218

RICHARD T. CONWAY
(Counsel of Record)
WILLIAM F. SHEEHAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for *Amici Curiae*

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the more common functions of implementing agreements and arbitration under ICC protective conditions. See, *e.g.*, *Anderson* v. *Norfolk & Western Ry. Co.*, 773 F.2d 880 (7th Cir. 1985); *Employees Protective Ass'n* v. *Norfolk & Western Ry.*, 511 F.2d 1040, 1043 (4th Cir. 1975).